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Georgetown Public Law and Legal Theory Research Paper No. 12-080

Georgetown Business, Economics and Regulatory Law Research Paper No. 12-026

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6 J. Int'l Econ. L. 797-839 (2003)

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TRADE SANCTIONS AND HUMAN RIGHTS — PAST, PRESENT, AND FUTURE

Carlos Manuel Vázquez^{*}

ABSTRACT

The relationship between the international law of trade and the international law of human rights has commanded an increasing amount of scholarly attention in the past few years, perhaps spurred by the well-known events at Seattle in 1999. This article offers some reflections on this relationship, focusing on the permissibility under international law of imposing trade sanctions against nations that commit violations of international human rights. Part I begins with some reflections on the historical relationship between these two bodies of law. Part I also considers why the human rights community appears to feel threatened by the international trade system, and not the other way around. Part II considers whether, under current trade norms, trade concessions may be suspended in response to human rights violations. Part III turns to the normative question: how should the WTO address human rights?

I. PAST

The nature and extent of the linkage between the international law of human rights and the international law of trade has been the subject of extensive commentary in recent years. To evaluate the arguments and proposals that have been made in this field, it is useful to begin by considering the historical relation between these two bodies of law, beginning with the era before there was any such thing as an international law of human rights or a multilateral international law of trade.

In the nineteenth century, the so-called classical period of international law, the obligations imposed on states by international law could be ‘enforced’ in a number of ways. Tribunals with a general compulsory jurisdiction over states were non-existent, although states often formed *ad hoc* tribunals to resolve particular disputes. In the absence of an agreement to submit a dispute to

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such a tribunal, states enforced their rights under international law through diplomatic intervention, countermeasures, and ultimately the use of military force. War was not illegal under international law, and the use of force – subject to principles of necessity and proportionality – was among the mechanisms recognized by international law for enforcing the norms of international law. Measures short of war that served this purpose included the suspension of trade benefits – what we would today regard as trade sanctions.

During this period, there was no such thing as an international law of human rights. This is not to say that international law did not impose obligations on states with respect to the treatment of individuals, but it only addressed their obligations with respect to the nationals of another state. A state's treatment of its own nationals was not regarded as a concern of other states or of the international community. Indeed, one of the principal functions of international law during this period was to insulate a state from international criticism for how it treated its own nationals.

This aspect of international law changed fundamentally in the twentieth century. The atrocities of the Second World War convinced the world that a state's treatment of its own nationals was indeed a proper concern of the international community. An international bill of rights was adopted, consisting of the Universal Declaration of Human Rights and the International Covenants on Civil and Political Rights and on Economic and Social Rights.¹ These have been supplemented by numerous other human rights conventions and treaties.² Although not all such conventions have been ratified by all countries, many have been ratified by most countries. Additionally, a customary international law of human rights has evolved binding states that are not parties to these conventions. And some fundamental human rights norms have attained the status of *jus cogens*, meaning that states may not contract out of them by treaty.³

At roughly the same time that the international law of human rights emerged, the UN Charter came into force and established that international law prohibited the use of force by one or a group of nations against the

¹ Universal Declaration of Human Rights, 10 Dec. 1948, G.A. RES. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 71 [hereinafter Univ. Dec. Hum. Rts.], U.N. Doc. A/180; International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 U.N.T.S. 3.

² See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), 9 Dec. 1948, 78 U.N.T.S. 277; International Convention on Elimination of Racial Discrimination, 21 Dec. 1965, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966); Convention on the Elimination of All Forms of Discrimination Against Women, 18 Dec. 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980); Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 10 Dec. 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535 (1985); Convention on the Rights of the Child, 20 Nov. 1989 [hereinafter Conv. on Rts. of the Child], 1577 U.N.T.S. 3, 28 I.L.M. 1448 (1989).

³ See Vienna Convention on the Law of Treaties, 23 May 1969 [hereinafter Vienna Convention], U.N. Doc. A/CONF. 39/27, art. 53.

territorial integrity of another state except in self-defense.⁴ This meant that the use of military force was no longer among the mechanisms to which states could generally resort to enforce their rights under international law. The UN Charter might thus be understood to have created a hierarchy among the norms of international law, establishing peace and the territorial integrity of states as the paramount norms of the international legal system, to which the other norms were subordinated, including the newly recognized norms of human rights.⁵ States were permitted to use force only in response to armed attacks against their territorial integrity, and the Security Council was empowered to authorize the use of force only in response to a 'threat to the peace, breach of peace, or act of aggression'.⁶

The elimination of military force from the arsenal of mechanisms available to enforce the norms of international law (other than those relating to peace and territorial integrity) left states with the ability to employ countermeasures not involving the use of force for this purpose. Prominent among such countermeasures was the suspension of any trade concessions previously granted by the injured state to the offending state. To the extent such concessions were conferred *ex gratia*, they could be unilaterally withdrawn even in the absence of a violation of international law. If conferred by treaty, however, such concessions could be withdrawn, consistently with international law, only in response to a violation of that treaty or another norm of international law by the beneficiary of the concession.⁷ (The suspension by a state of an international obligation owed to another state in response to the latter state's violation of an international obligation owed to it is known as a countermeasure.⁸) In short, the prohibition of the use of force left trade

⁴ UN Charter, art. 2, para 4 (establishing norm against the use of force); UN Charter, art. 51 (providing exception to norm against use of force in case of self-defense). The UN Charter prohibition on the use of force had been preceded by a similar prohibition in the Kellogg-Briand Pact. See General Treaty for the Renunciation of War (Kellogg-Briand Pact), 27 Aug. 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (arts. I and II condemning recourse to war and prohibiting resolution of disputes except by peaceful means).

⁵ See Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (London; New York: Routledge, 1993) 34, 40–45 (discussing the primacy of peace over justice in the UN Charter).

⁶ UN Charter, art. 39. See also UN Charter, art. 42 (empowering the Security Council to 'take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'); UN Charter, art. 2, para 4 (prohibiting nations from 'the threat or use of force against the territorial integrity or political independence of any state ...').

⁷ Marian Nash, 'Contemporary Practice of the United States Relating to International Law', 92 Am. J. Int'l L. 251, 252 (1998) (section I of article discussing countermeasures under international law).

⁸ See *Draft Articles on the Responsibilities of States for Internationally Wrongful Acts, Adopted by the International Law Commission at Its 53rd Session* (2001) [hereinafter *Draft Articles on State Responsibility*], art. 49(2). The term 'countermeasure' is sometimes used to refer not only to reprisals (the non-performance by a state of an obligation owed to another state in response to the other state's violation of an international obligation owed to it) but also retorsion (an unfriendly act not amounting to a breach of an international obligation taken in response to another state's violation of an international obligation). See Oscar Schachter, *International Law in Theory and in Practice* (Kluwer, 1991) 185. I shall use the term here, as it is used in the Draft Articles, to refer only to reprisals.

sanctions as among the most coercive of the available mechanisms for enforcing the norms of international law, including international human rights norms.⁹

However, another contemporaneous development potentially restricted the use of this mechanism as well. The General Agreement on Tariffs and Trade (hereinafter the GATT),¹⁰ a treaty concluded by many, though not all, of the Members of the United Nations, barred quantitative restrictions in imports and exports¹¹ and entitled all parties to Most Favored Nation treatment by other parties,¹² as well as to national treatment of their imported goods.¹³ These provisions were subsequently incorporated into the WTO agreements

⁹ The extent to which State A is permitted under general international law to take countermeasures in response to State B's violation of the human rights of its own citizens is a matter of some debate. The International Law Commission's Draft Articles on State Responsibility would permit only the 'injured state' to take countermeasures, and they define 'injured state' to include, in the case of obligations owed to the international community as a whole, only states 'specially affected' by the violation. See *Draft Articles on the Responsibilities of States for Internationally Wrongful Acts, Adopted by the International Law Commission at Its 53rd Session* (2001), art. 42 (defining 'injured state'), art. 49 (entitling only an 'injured state' to take countermeasures). However, the Draft Articles may in this respect be more an attempt at the progressive development of international law than a codification of established law. Cf. David Bederman, 'Counterintuiting Countermeasures', 96 Am. J. Int'l L. 817 (2001) (considering other respects in which the Draft Articles' provisions on countermeasures amount to progressive development). An earlier version of the Draft Articles would have defined an 'injured state' to include all states in cases where 'the right [that was violated] has been created or is established for the protection of human rights and fundamental freedoms'. Art. 40, International Law Commission, *Draft Articles on States Responsibility Adopted on First Reading, Report of the International Law Commission on the Work of Its Forty-Eighth Session*, U.N. Doc A/51/10 (1996), available at www.un.org/law/ilc/archives/statfra.htm The ILC's earlier position seems more consistent with the status of fundamental human rights norms as obligations *erga omnes*. Because such obligations are owed to the international community as a whole, one would think that all states would have standing to take the measures available under international law to respond to violations. That appears to be the position of the Restatement (Third) of the Foreign Relations Law of the United States, which states in comment (a) to section 905 that '[t]he principles governing unilateral countermeasures apply as well when a state responds to a violation of an obligation to all states (*erga omnes*)'. That all states may take countermeasures in response to violations of human rights by other states – at least the most serious violations – appears to be the prevailing view among scholars as well. See Lorand Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction', 36 J. World Tr. 353, 362–63 and n 48 (2002); Jonathan I. Charney, 'NATO's Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo', 93 Am. J. Int'l L. 834, 835 (1999); Yoram Dinstein, 'The erga omnes Applicability of Human Rights', 30 Archiv des Völkerrechts 16, 17–18 (1992); Karin Oellers-Frahm, 'Comment: The erga omnes Applicability of Human Rights', 30 Archiv des Völkerrechts 28, 31 (1992); Pieter Jan Kuyper, 'International Legal Aspects of Economic Sanctions', in Petar Sarcevic and Hans van Houtte (eds), *Legal Issues in International Trade* (London; Boston: Graham & Trotman, 1990) 152; Bruno Simma, 'Self-Contained Regimes', 16 Netherlands Y.B. Int'l L. 111, 133 (1985). But see Prosper Weil, 'Towards Relative Normativity in International Law?', 77 Am. J. Int'l L. 413, 432–33 (1983). The remainder of this article assumes that all states would be entitled to take countermeasures in response to serious violations of fundamental human rights by other states, in the absence of any specific limitation of this power in the GATT or other treaties.

¹⁰ General Agreement on Tariffs and Trade, 30 Oct. 1947, 55 U.N.T.S. 194, T.I.A.S. No. 1700 [hereinafter GATT 1947].

¹¹ GATT 1947, art. XI.

¹² GATT 1947, art. I.

¹³ GATT 1947, art. III.

of 1994¹⁴ and are central to the WTO regime of international trade regulation. These provisions appear on their face to prohibit the imposition of trade sanctions on Member States. It is these provisions that have given rise to concern among international human rights advocates.

One might well ask why it is the advocates of international human rights who fear a potential conflict with international trade norms and not international trade advocates who fear a conflict with international human rights norms. As noted above, even before there was a GATT, states had concluded numerous bilateral agreements with each other – known as Treaties of Friendship, Commerce, and Navigation (hereinafter FCN treaties) – in which they agreed to afford other states rights much like those in the multilateral GATT, such as MFN status and national treatment. Under general international law, a violation by one state of one of its obligations under international law would entitle another state to take action – subject to rules about proportionality – that it would otherwise be precluded from taking under international law. Thus, if State A breached a non-trade-related treaty obligation towards State B, State B would be justified in withholding an obligation to State A under an FCN treaty.¹⁵ If so, then would we not reach the same conclusion under the GATT/WTO? In other words, even if the GATT requires parties to afford MFN status to other parties, don't general rules of customary international law entitle parties to withhold such a benefit in response to violation of other international law norms by other parties? If so, then perhaps it is international trade advocates who should be worried, as the benefits of agreements such as the GATT could well be lost in the event of human rights violations.

There appear to be two reasons why the concern is largely on the side of the human rights community. First, the concern is not just that the GATT/WTO requires that parties be granted MFN status, but more specifically that it forbids trade sanctions *even in response to violations of human rights or other norms of international law*, in much the same way that the UN Charter forbids the use of force even in response to a violation of international law by other states (except in limited circumstances). In other words, the claim that concerns human rights activists is that the WTO purports to deny the human rights regime the ability to employ trade sanctions as countermeasures. I consider below whether the GATT does in fact restrict the availability of trade sanctions in response to human rights violations, but let us assume for present purposes that it does. If that is the content of the trade rule, then it purports to

¹⁴ General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 1A, 15 Apr. 1994, 33 I.L.M. 1125, 1154 (1994) [hereinafter GATT 1994].

¹⁵ See generally Schachter, above n 8, 190–91 (1991) (addressing the relationship between the Vienna Convention and the traditional international law of countermeasures). See also Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, London; New York: Routledge, 1997) 271–72.

eliminate the possibility of using trade sanctions to enforce human rights norms. If the human rights norm is one that does not have the status of *jus cogens*, then the subsequent conclusion of a treaty in which the parties agree not to impose trade sanctions for the violation of the norm prevails under well-established principles of international law (*lex posterior*).¹⁶

Even if the relevant human rights norm is one that has attained the status of *jus cogens*, a subsequent treaty agreeing not to employ trade sanctions to enforce the norm would appear to be valid under general international law. Presumably, the norm having *jus cogens* status is the substantive norm prohibiting the behavior that directly infringes the relevant human right. The rule that allows other states to impose trade sanctions in response to a violation of *jus cogens* does not itself have *jus cogens* status. Indeed, it is difficult to see how a permissive rule could ever have the status of *jus cogens*. If international law merely *permits* states to impose trade sanctions in response to a violation of a *jus cogens* norm by another state, then an agreement among a subset of states not to exercise this power would appear to be unproblematic. The later norm would be valid under international law because it does not conflict with the *jus cogens* norm.¹⁷

For the same reason, the trade rule would be valid even if the relevant rule of international law entered into force *after* the trade rule. A later-in-time rule of human rights law – that is, a rule imposing certain obligations on states with respect to their own nationals – would not conflict with an agreement among the same states not to use trade sanctions in response to a violation of the rule by other states.

For this reason, the important issue for international lawyers is what the trade norm purports to require. If the trade rule prohibits the use of trade sanctions even in response to a violation of human rights law by another state, then there would appear to be nothing in general international law that would call the validity of such a rule into doubt. If the trade norm is in fact of that nature, then it might plausibly be claimed that the trade regime purports to set up a hierarchy of norms in much the same fashion as do the norms regarding the use of force. Just as the norms regarding the use of force might be said to elevate peace and territorial integrity as the paramount norms of the international system, so might the trade regime be said to elevate trade norms over the remaining norms of the international legal system. Under the UN Charter, force may be used by states in response to a violation of the prohibition of the use of force (i.e., in self-defense). If the WTO agreements prohibit the use of economic sanctions to respond to violations of international law other than those in the trade agreements themselves, then

¹⁶ Vienna Convention, art. 30.

¹⁷ For more on whether international law includes a norm requiring states to ban the importation of products made in a manner that violates *jus cogens* norms, see below text accompanying nn 92–98.

the non-trade-related norms of international law are not even potentially backed by either of the two most coercive sanctions in the international legal system.

Hence the concern of human rights advocates: With the prohibition of the use of force, only countermeasures not involving force remained available to enforce human rights norms. Trade sanctions are perhaps the most coercive of such measures, and they have been among the most widely used. Trade sanctions against South Africa are widely credited with having hastened the fall of the apartheid regime in that country.¹⁸ Trade sanctions have long been threatened by the United States against China for its human rights violations. Human rights advocates have expressed concern that China's admission to the WTO would insulate it from such sanctions.¹⁹ More generally, human rights advocates fear that the elimination of trade sanctions as a mechanism for enforcing human rights norms would render international human rights norms relatively toothless.²⁰

But the fact that trade law purports to restrict the ability of states to employ trade sanctions in response to human rights violations does not fully explain why human rights activists are so concerned. All rules of international law can be broken (as a factual matter, although of course not as a legal matter). If State A violates a rule of international human rights law, then what is to prevent State B from responding to it by violating its obligation under the GATT not to impose trade sanctions in response to the violation? At this point, the human rights activist points to the relative efficacy of the WTO's mechanisms for enforcing trade law. When the WTO was created in 1994, a complex dispute settlement system was added to the GATT, empowering parties injured by a violation of the WTO agreements to initiate proceedings against the violator.²¹ Although the system is still fairly new, it is already widely regarded as perhaps the most effective dispute settlement system in international law.²² The enforcement scheme established by the principal

¹⁸ Gary C. Hufbauer *et al.*, *Economic Sanctions Reconsidered: History and Current Policy* (2nd edn, Washington, DC: Institute for International Economics, 1990) 246–48 (concluding that sanctions against South Africa were effective, citing three other scholars who hold the same view); Richard W. Parker, 'The Cost Effectiveness of Economic Sanctions', 32 *Law & Pol'y Int'l Bus.* 21 n 27 (2000).

¹⁹ See, e.g., Ryan Goodman, 'Norms and National Security: The WTO as a Catalyst for Inquiry', 2 *Chi. J. Int'l L.* 101, 104 (2001) (citing concerns expressed in Congress that Chinese accession to WTO would make it more difficult for the US to sanction China for human rights violations).

²⁰ See, e.g., Sarah H. Cleveland, 'Human Rights Sanctions and International Trade: A Theory of Compatibility', 5 *JIEL* 133 (2002), at 188–89 [hereinafter 'Human Rights Sanctions and International Trade'].

²¹ Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Investment Disputes (the Dispute Settlement Understanding), 15 Apr. 1994, 33 *I.L.M.* 1143 (1994) [hereinafter DSU].

²² See, e.g., Kal Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation', 32 *Case W. Res. J. Int'l L.* 387, 438 (2000) (stating that the DSU 'provides one of the most effective sticks in international law').

human rights treaties, by contrast, is widely regarded as weak.²³ It relies on committees that monitor implementation of the treaties, which have the power to submit proposals, recommendations, and reports but no power to adjudicate disputes or award relief.²⁴

It appears that the fears of the human rights community are directly traceable to the strengthening of the trade regime's dispute settlement system. Thus, the fact that South Africa was a founding member of the GATT²⁵ did not insulate it from apparently GATT-inconsistent trade sanctions.²⁶ Human rights organizations have expressed great concern that the new WTO would effectively prevent the use of such sanctions today.²⁷ In short, the human rights community is concerned that, if trade law does in fact prohibit the use of trade sanctions in response to human rights violations, then, given the relative strength of the trade regime's enforcement system, the prohibition of trade sanctions is more likely to be complied with by reluctant states than the prohibition of human rights violations.

Consider two parallel developments in China, one involving human rights and the other involving trade. There have long been human rights problems in China.²⁸ These problems have for some years been the subject of scrutiny in

²³ See, e.g., Louis Henkin, 'Human Rights and State "Sovereignty"', 25 *Ga. J. Int'l & Comp. L.* 31, 41 (1996) (observing that '[e]nforcement has always been seen as the weak link in the international legal system, and it is surely the weak link of international human rights law'); Harold Hongju Koh, 'How Is International Human Rights Law Enforced?', 74 *Ind. L.J.* 1397, 1398 (1999) (noting the common view that human rights enforcement is weak).

²⁴ See generally ICCPR, arts. 28–47.

²⁵ See GATT 1947, preamble.

²⁶ Although art. XXI(c) to GATT 1947 provides an exception for trade sanctions authorized by the UN Security Council, and although the Security Council did authorize certain sanctions against the apartheid regime in South Africa, South Africa was subjected to sanctions by GATT members such as the United States that went beyond what was authorized by the Security Council. In 1977, the Security Council called for an 'embargo on shipments of arms, munitions, and military equipment' to or from South Africa. U.N. S.C. RES. 418 (1977). In 1985, the Security Council called for suspension of investment, guaranteed export loans, new nuclear contracts, and export of certain computer equipment, while prohibiting trade in South African Krugers. U.N. S.C. RES. 569 (1985). The 1986 US prohibitions against trading in agricultural products, minerals and steel with South Africa were not authorized by the Security Council resolutions. The Comprehensive Anti-Apartheid Act (Anti-Apartheid Act or the Act), Pub. L. No. 99-440, 100 Stat. 1086 (1986). Eight years after the imposition of US sanctions, apartheid ended when F.W. de Klerk ceded the reins of the South Africa government to Nelson Mandela.

²⁷ Eric Altbach, 'USTR to Defend Massachusetts' Burma Law', JEI Report, 22 Aug. 1997, available at 1997 WL 9040487 (citing a 1997 letter to then US Trade Representative Charlene Barshefsky in which human rights organizations argued that if the WTO had existed in the 1980s, 'state sanctions against South Africa which helped bring peaceful democracy to that country would never have been possible').

²⁸ See Amnesty International Report 2001 (reporting that in China during the calendar year 2000 'the crackdown on religious groups and ethnic minorities continued unabated. Hundreds of followers of "heretical" religious or spiritual movements were arrested and reportedly tortured. At least 93 Falun Gong followers were believed to have died in custody and hundreds of Buddhist nuns and monks remained in detention in Tibet. Ethnic Uighurs labelled as 'separatists' or 'terrorists' were executed

the United States Congress, which, until recently, periodically considered whether Most Favored Nation (MFN) status should be extended to that country.²⁹ For some time now, China has defended itself by criticizing international human rights law as reflecting Western values. It has denied the existence of universal human rights norms and decried the human rights movement as an attempt to impose Western values on Asian states for which they are inappropriate. Despite taking this position, however, China signed the International Covenant on Civil and Political Rights in October 1998 and promised at that time to ratify it shortly.³⁰ If China does ratify that treaty, it will have bound itself to those norms, whether these rights are Western in origin or not.³¹

The importance of such ratification for human rights in China, however, could be significantly overshadowed by a parallel development: China's entry into the WTO system. The combination of China's ratification of the ICCPR and its entry into the WTO could be regarded as a net loss for human rights in China. By ratifying the ICCPR, China would be opening itself up to the scrutiny of the ICCPR Human Rights Committee. But this Committee lacks the power to adjudicate or award relief. On the other hand, by becoming a Member of the WTO, China may be insulating itself from the sort of scrutiny that is backed by the possibility of economic sanctions. If so, the United States and other WTO Members would no longer be free to consider the denial of MFN status to China because of its human rights record. China would automatically be entitled to such status as a member of the WTO.³² Moreover, as parties to the Dispute Settlement Understanding, the United States and other WTO Members would themselves be subject to claims before adjudicative tribunals if they fail to accord China MFN status, and the judgments of such tribunals would be binding on them.

That the norms of the trade regime are backed by a more efficacious enforcement regime has been a ground for suggesting that there is now an additional hierarchy of norms in international law. Joost Pauwelyn has

mostly after secret or summary trials where convictions were based on confessions extracted under torture. Thousands remained in prison.');

see also *Agence France Presse*, 19 May 2001 (observing that 'China's controversial "one child [per couple]" policy continues to result in serious human rights violations 20 years after it became law.').

²⁹ But cf. U.S.-China Relations Act, Pub. L. No. 106-286, 114 Stat. 880 (2000) (instituting permanent normal trading relations with China, thereby ending Congress's annual review of China's MFN status).

³⁰ Though it has still not ratified the ICCPR, China continues to make such promises. See 'China vows to ratify UN rights covenants before United States', *Agence France-Presse*, 14 Jun. 2000.

³¹ Pending ratification, China has an obligation not to defeat the object and purpose of the treaty. See Vienna Convention on the Law of Treaties, 23 May 1969, art. 18.

³² See GATT 1994, art. I.

suggested that, in the international legal system, ‘in a sense, a “two-class society” does exist, between rules of international law that can be judicially enforced before a court with compulsory jurisdiction and those that cannot.’³³ Other scholars similarly suggest that norms not backed by judicially enforceable sanctions are less ‘binding’ than those that are.³⁴ If the GATT/WTO agreements did insulate states that violate international human rights from economic sanctions and provide a legal remedy to states that violate human rights against those that respond through economic sanctions, then the claim that international human rights law has in some respects been relegated to second-class status in the international legal system would have some plausibility.³⁵ But, if so, the second-class status of human rights norms would not necessarily be the *result* of the existence of a more effective enforcement scheme for trade norms than for human rights norms. The more effective enforcement scheme could instead be a *reflection* of the international community’s stronger commitment to compliance with trade norms than with human rights norms. It would be that stronger commitment that would justify the claim that trade norms have a higher status in international law. The more effective enforcement scheme would simply be evidence of that stronger commitment.

Indeed, on closer analysis, the mechanisms established in the WTO’s Dispute Settlement Understanding are not significantly more coercive than those of international law generally. The enforcement regime in international trade law includes compulsory adjudication, including an appeal. These features of the system permit the specification of Member state obligations in particular factual contexts. Such specification certainly facilitates compliance, as ambiguity in a norm’s applicability to particular facts makes violations more likely. The existence of an appeal also lends reliability to the outcome of adjudications, which also makes compliance more likely. But it is important to note that the mechanisms for ‘enforcing’ the judgments of international trade tribunals are basically the same as the mechanisms for enforcing international

³³ Joost Pauwelyn, ‘The Role of Public International Law in the WTO’, 95 Am. J. Int’l L. 535, 553 (2001). Pauwelyn does add in a footnote, however, that the absence of judicial enforcement mechanisms does not mean that the norm will not be complied with, or even that its enforcement regime is less effective. *Id.* at 553 n 119.

³⁴ See, e.g., Joel Trachtman, ‘The International Economic Law Revolution’, 17 U. Pa. J. Int’l Econ. L. 33, 58 (1996). Cf. James Thuo Gathii, ‘Re-Characterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis’, 7 Wid. L. Symp. J. 137, 143 (2001) (noting critically that ‘it is arguable that the peripheral place social issues occupy in trade analysis will result in the perpetuation of a hierarchy that places the pro-trade agenda ahead of social issues’).

³⁵ However, the claim can at best be that human rights norms (and others not backed by efficacious compulsory adjudicatory mechanisms) are second-class norms along the dimension of the states’ commitment to compliance. In other respects, human rights norms – at least some human rights – are thought to have a higher normative status than other norms of the international legal system. For example, some human rights norms have the status of *jus cogens*. See below text accompanying n 92.

law generally. Specifically, international trade law depends on a regime of countermeasures: if the losing state does not comply with the Appellate Body's judgment by altering its nonconforming conduct, the prevailing state is entitled to take action that would otherwise infringe the losing state's rights under the WTO agreements. It can, for example, ban the importation of certain products of the losing state, subject to rules of proportionality similar to those that apply in international law generally. Indeed, with respect to countermeasures, the DSU appears to be restrictive in its effects: it restricts the circumstances in which countermeasures may be imposed (i.e., only after a state has been adjudged a violator of its WTO obligations) and the types of countermeasures that may be imposed (only benefits under WTO agreements may be suspended).³⁶

It is thus far from clear that international trade law is materially more coercive than international law generally. The effectiveness of the regime for enforcing international trade law may instead be attributable to the Member States' strong desire to maintain the trade system and their recognition that the benefits of that system can be achieved only if all of the system's rules are generally complied with. Because of the interdependence of the system's rules and the reciprocal nature of the duties and benefits, self-interested states rationally subordinate the short-term interests that might otherwise lead them to violate their international trade obligations in order to attain the long-term benefits afforded by that system. They fear that a violation of the rules will not only lead other states to retaliate, but could also bring the entire system down. And they are convinced that they have more to gain than to lose from the existence of the system. This sort of rational self-interest is, in fact, what has always led states to observe rules of international law in the absence of an external force able to enforce the rules.

Indeed, it is not clear that the trade regime's dispute settlement system has produced increased compliance since the addition of the Dispute Settlement Understanding in 1994. Compliance with the GATT and with GATT panel decisions was actually quite strong in the pre-WTO era.³⁷ And it is not clear that compliance has improved significantly since the current dispute

³⁶ See DSU, art. 1 and GATT 1994, art. XXIII para 1 (provisions functioning jointly to limit jurisdiction of the WTO dispute settlement body to disputes arising under GATT Agreements listed in Appendix 1 to the DSU); DSU, art. 22 and GATT 1994, art. XXIII para 2 (provisions functioning jointly to limit measures available if losing party does not comply with panel recommendation to 'compensation' and 'suspension of concessions').

³⁷ Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Salem, NH: Butterworth Legal Publishers, 1993) 285–87 (calculating that complaining party received full or partial satisfaction of complaints in ninety percent of dispute settlement cases brought under GATT 1947), cited in John H. Jackson, William J. Davey, and Alan O. Sykes, Jr, *Legal Problems of International Economic Relations: Cases, Materials and Text on the National and International Regulation of Transnational Economic Relations* (3rd edn, St. Paul, MN: West Pub Co, 1995) 339.

settlement system was put in place.³⁸ The effectiveness of the trade regime may thus not be attributable to the dispute settlement system. The elaborate dispute settlement system may rather be evidence of a predisposition to comply with trade norms.

Of course, if the GATT does preclude or restrict trade sanctions in response to human rights violations, then the enforcement system for human rights would lack at least one mechanism that the trade system enjoys: trade sanctions. This would not necessarily deprive the human rights regime of all sanctions of comparable coerciveness. In theory, at least, states would still be able to respond to human rights violations by, for example, denying visas to all persons from countries that violate human rights,³⁹ or denying their airplanes landing rights.⁴⁰ Indeed, protection of human rights in certain contexts is increasingly becoming recognized as a basis for the use of military force – with

³⁸ See Carolyn B. Gleason and Pamela D. Walther, 'The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform', 31 *Law & Pol'y Int'l Bus.* 709, 721–38 (2000) (citing five cases of non-compliance with WTO DSB panel decisions between 1994 and 2000, including the notorious failures to comply in the *EU – Bananas* and *Beef Hormone* cases). Of course, it is possible that more marginal cases are being brought today because of the enhanced dispute settlement system, and that the less marginal cases are being settled (or that less marginal violations of the GATT are being successfully deterred by the stronger dispute settlement system). If so, then the similarity in the rates of compliance with the decisions in adjudicated cases may not be an accurate reflection of the effectiveness of the dispute settlement system. See Rufus H. Yerxa and Demetrios J. Marantis, 'Assessing the New WTO Dispute System: A U.S. Perspective', 32 *Int'l Law.* 795, 808 (1998) (stating that '[t]he WTO Secretariat has recently pointed out that the new DSU is helping to create a more effective deterrent to WTO violations').

³⁹ Compare Cuban Liberty and Democratic Solidarity Act of 1996 (Helms-Burton Act), Pub. L. No. 104–116 (1996) (Title IV mandating that US Department of State deny visas to aliens who have confiscated or trafficked in property subject to claim under the Helms-Burton Act). It is true that Helms-Burton was regarded by many as a violation of international law. See, e.g., Organization of American States, Inter-American Juridical Committee, Opinion Examining the Helms-Burton Act, 27 Aug. 1996, 35 *I.L.M.* 1322 (1996). The attempt to defend the Helms-Burton law as a reprisal for Cuba's taking of property without compensation runs into the arguments that Cuba's confiscation of the property of persons who were not its nationals at the time of the taking did not amount to a violation of international law, and that, in any event, the law had significant effects on the nationals of third states. Cf. Schachter, above n 11, at 192 (otherwise valid countermeasure invalid if they 'injure innocent third parties'). A denial of visas to the nationals of a country that engages in gross violations of human rights would not appear to suffer from this problem.

⁴⁰ See 'U.S. Actions estimated to cost Soviets \$1.5–2 Million Annually', *Aviation Week & Space Tech.*, 19 Oct. 1983, at 18 (stating that, in response to the imposition of martial law in Poland, the US suspended its aviation treaty with the USSR exchanging landing rights); see also Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford; New York: Oxford University Press, 1989) 230–42 (arguing that sanctions for human rights violations may include withdrawal of landing rights previously granted to the violating state by treaty). I am assuming here that the human rights regime is not a 'self-contained regime'. If it were, then the only enforcement measures available for human rights violations would be those specifically set forth in human rights treaties, such as complaints before the relevant treaty bodies. See generally Bruno Simma, 'Self-Contained Regimes', 16 *Neth. Y.B. Int'l. L.* 111 (1985) (discussing and rejecting argument that the international law of human rights is a self-contained regime). If the human rights system were a self-contained regime, then trade sanctions would be unavailable quite apart from anything in the WTO Agreements.

the authorization of the Security Council⁴¹ and, much more controversially, without.⁴² For this reason, among others, the broad claim that human rights have been relegated to a second-class status in international law is too crude. Nevertheless, the use of military force to protect human rights presents problems of its own, and such force can in any event be resorted to only in rare circumstances. The fact remains that, if the WTO agreements prohibit the suspension of trade restraints in response to human rights violations by Member States, it would deprive the human rights regime of one sort of sanction that it previously possessed and that the human rights community appears to regard as important. Whether they do deprive the human rights regime of the option of employing economic sanctions is the subject of the following section.

II. PRESENT

In this section, I consider the extent to which current GATT provisions, as they have been interpreted, prohibit or restrict Members from imposing trade sanctions in response to violations of international human rights norms by other Members. I first consider the permissibility of tailored sanctions – that is, the prohibition of the importation of products produced in a way that violates international human rights norms. I shall use as the paradigmatic example of tailored sanctions a prohibition of the importation of products made with indentured child labor. I then consider the permissibility of general sanctions, such as a prohibition of the importation of diamonds from a country that engages in torture.⁴³ Because the GATT-legality of neither form of human-rights-based trade sanction has been tested in GATT or WTO adjudication, I shall discuss the WTO's treatment of analogous sorts of trade restrictions, taking into account possible differences between these analogous restrictions and the two categories of human-rights-based trade restrictions mentioned above.

The provisions of the GATT most directly relevant to human rights concerns are Articles I, III, XI, and XX and XXI. Article XI prohibits any quota or other 'quantitative restrictions' on imports or exports. Tariffs are permitted, but Article II binds states not to exceed the maximum levels set

⁴¹ See Mary Ellen O'Connell, 'Re-Leashing the Dogs of War', 97 Am. J. Int'l L. 446, 453 (2003) (noting that, before Kosovo, states 'took the position, time and again, that force could not be used for humanitarian purposes without Security Council authorization').

⁴² Id (noting that, after Kosovo, 'the United Kingdom and Belgium spoke officially in terms of *developing* a doctrine of humanitarian intervention'); Louis Henkin, 'NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention"', 93 Am. J. Int'l L. 824, 828 (1999) ('The NATO action in Kosovo, and the proceedings in the Security Council, may reflect a step toward a change in the law ...').

⁴³ I borrow the terms 'tailored' and 'general' sanctions from Sarah Cleveland, 'Human Rights Sanctions and International Trade', above n 20, at 138. For simplicity's sake, I shall not discuss her intermediate category of semi-tailored sanctions.

forth in lengthy schedules attached to the GATT. Article III is the 'national treatment' provision. It provides that, once a product is imported, the importing state may not be subject it to regulations less favorable than apply to 'like products' produced domestically. Article I, the Most Favored Nation clause, prohibits states from treating the products of one Member State less favorably than the 'like products' of other Member States. Thus, Article III prohibits discrimination between imported and domestic products, and Article I prohibits discrimination between products of one country and those of another.

Article XX sets forth a number of exceptions to the foregoing provisions. It permits some otherwise prohibited measures, as long as 'such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'.⁴⁴ The most pertinent of the exceptions in Article XX are found in subparagraph (a), which permits measures 'necessary to protect public morals'; subparagraph (b), which permits measures 'necessary to protect human, animal or plant life or health'; and subparagraph (e), which permits measures 'relating to the products of prison labour'. Another exception, relevant to trade restrictions in the environmental context, is that found in subparagraph (g), which permits measures 'relating to the conservation of exhaustible natural resources ...'. Finally, Article XXI, the so-called national security exception, provides in relevant part that '[n]othing in [the GATT] shall be construed ...

- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests ... (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.'

Subsection (c) of Article XXI would validate any trade sanctions authorized by the UN Security Council. Such sanctions have sometimes been imposed in response to gross violations of human rights.⁴⁵ Our examination will accordingly be limited to trade sanctions imposed by one or a group of states but not authorized by the Security Council. Subsection (b) of the security exception will be discussed in due course. First, however, I shall examine how the other cited articles of the GATT have been interpreted.

⁴⁴ GATT 1994, art. XX. This language is known as the article's chapeau.

⁴⁵ See, e.g., Sanctions against South Africa, above n 26; see also U.N. S.C. Res. 841, U.N. Doc. S/RES/841 (1993) (imposing sanctions against Haiti for human rights violations).

A. Tailored sanctions

In the year 2000, a statute was enacted in the United States banning the importation of goods made with ‘forced or indentured child labor’.⁴⁶ It is widely agreed that the use of forced or indentured child labor is a violation of international human rights norms.⁴⁷ Is the United States’ use of trade measures to enforce these norms consistent with its WTO commitments? The US law is a quantitative restriction that would appear to violate Article XI. But here the Interpretive Note to Article III must be considered. This Note indicates, in substance, that a regulation enforced at the border is valid if it meets the national treatment standard of Article III.⁴⁸ Under this Note, therefore, the ban on importation of goods made with child labor can be treated as a regulation banning the sale in the United States of goods made with child labor. Is a regulation banning the sale in the United States of goods made with child labor valid under Article III if it is applied to products made in another Member State?

Not all commentators agree on the correct analysis, but the weight of authority supports the conclusion that the law does not pass muster under Article III. It might be argued that a law banning the sale of products made with child labor is valid under Article III as applied to imported products because the law applies equally to domestic products.⁴⁹ Article III prohibits Member States from applying to imported products any regulation that is less favorable than the regulations that apply to ‘like products’ produced domestically. A domestic product made without child labor is, according to this argument, not ‘like’ an imported product made with child labor.⁵⁰ An

⁴⁶ Trade and Development Act of 2000, Pub.L. 106–200, Title IV, § 411(a), 114 Stat. 298, amending 19 U.S.C. § 1307 (West Supp. 2000). This statute involves what is known as a PPM – that is, a trade restriction based on the process by which a product was made. The initials stand for ‘Processes and Production Methods.’ See Steve Charnovitz, ‘The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality’, 27 Yale J. Int’l L. 59, 59 (2002) [hereinafter ‘The Myth of Illegality’].

⁴⁷ See ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention 182), 17 June 1999, 38 I.L.M. 1207, available at <http://www.ilo.org> (accessed 9 June 2002); Univ. Dec. Hum. Rts. art. 4 (clarifying human rights provisions in the UN Charter by declaring that ‘no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.’); Conv. on Rts. of the Child, art. 32(1) (prohibiting economic exploitation of children); Geneva Dec. of the Rts. of the Child (1924).

⁴⁸ See Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, signed at Geneva, 14 Sept. 1948, 62 U.N.T.S. 104 (publishing text of Interpretive Note to Article III).

⁴⁹ An argument along these lines is developed in Robert Howse and Donald Regan, ‘The Product/Process Distinction – An Illusory Basis for Disciplining “Unilateralism” in Trade Policy’, 11 Eur. J. Int’l L. 249 (2000), in the context of environmental PPMs. The authors reserve judgment on whether their conclusions would apply outside the context of environmental PPMs. See *id.* at 283–84.

⁵⁰ See, e.g., Francesco Francioni, ‘Environment, Human Rights, and the Limits of Free Trade’, in Francesco Francioni (ed), *Environment, Human Rights and International Trade* above n 20, at 17–18.

imported product made with child labor is 'like' a domestic product made with child labor, and Article III is satisfied if in the United States the sale of both is banned. This argument has not been widely accepted, however.⁵¹ The term 'like product' has instead been understood to refer to the physical characteristics of the product itself and certain aspects of how the product is treated in the importing country, but not the way it was made in the exporting country.⁵² This is the so-called product-process distinction.⁵³ Thus, a product made with child labor is 'like' a product made without child labor, as long as the products themselves are the same.

Even if the prohibition of the importation of the products of child labor runs afoul of Article III or XI, however, it might still be valid if it falls within one of the exceptions in Article XX. The exception for the products of prison labor would appear not to cover forced or indentured child labor, as the latter category seems broader.⁵⁴ Does the ban fall within the exceptions for measures 'necessary to protect public morals' or 'necessary to protect human ... life or health'? That would depend, first, on whether these provisions refer only to measures by the importing state designed to protect the morals or health of the people within its territory (what Steve Charnovitz has called 'inwardly directed' measures⁵⁵) or also cover measures to protect the morals or health of persons in the exporting state or elsewhere outside the importing state (outwardly directed measures). It is clear that Articles XX(a) and (b) encompass inwardly directed measures such as restrictions on the importation of pornography or unsafe products; it is less clear that they encompass outwardly directed measures.

Although the WTO has not spoken on the validity of human rights PPMs, its treatment of environmental PPMs sheds some light on the issue. The Tuna/Dolphin dispute involved a US restriction on the importation of tuna

⁵¹ See Charnovitz, 'The Myth of Illegality', above n 46, at 92 (stating that, '[w]hatever the validity of the [Howse and Regan] legal analysis, any optimism that future WTO panels will tolerate origin-neutral PPMs in the context of Article III would be unfounded.').

⁵² Id at 91 and n 170 (noting that the Appellate Body in the Asbestos case 'makes clear that a determination of "likeness" goes beyond the physical characteristics of the product' and includes 'such criteria as the end-uses of the product, consumers' tastes and habits in respect to the product, and the tariff classification of the product').

⁵³ For a critique of the product-process distinction, see Howse and Regan, above n 49. For a response, see John H. Jackson, 'Comments on Shrimp/Turtle and the Product/Process Distinction', 11 *Eur. J. Int'l L.* 303 (2000).

⁵⁴ See Steve Charnovitz, 'The Moral Exception in Trade Policy', 38 *Va. J. Int'l L.* 689, 697 (1998) [hereinafter 'The Moral Exception']. But cf. Sarah H. Cleveland, 'Human Rights Sanctions and the World Trade Organization', in Francesco Francioni (ed), *Environment, Human Rights and International Trade* (Oxford; Portland, OR: Hart Pub., 2001) 238–39 [hereinafter 'Human Rights Sanctions and the WTO'] (stating that '[t]he [prison labour] provision plausibly might be interpreted to allow restrictions on goods made under prison-like conditions, such as certain forms of forced or bonded labour, including certain forms of exploitative child labour').

⁵⁵ See Charnovitz, 'The Moral Exception', above n 54, at 695.

that had been caught in a manner that endangered dolphins.⁵⁶ The United States defended the ban as a measure ‘necessary to protect ... animal ... health’. When Mexico challenged the ban, the panel agreed with Mexico’s argument that the exception applied only to measures designed to protect the health of dolphins within the United States. The panel expressed concern that the United States’ interpretation would permit states to prescribe norms extraterritorially and to penalize nationals of other states who fail to comply with such prescriptions by denying them their trade rights under the GATT. This pre-WTO panel decision was not adopted, and hence lacks the authority the WTO Agreement accords to adopted GATT panel decisions, but it was widely supported by GATT parties other than the United States.⁵⁷

Commentators have questioned the Tuna/Dolphin panel’s view that the measure involved in that case was extraterritorial. They have argued that a ban on imports that were produced in a certain way is not a regulation of the production process within the exporting state, but rather a regulation of access to the importing state’s market. The measure is a purely ‘territorial’ one as it regulates the product’s entry into the importing state’s territory.⁵⁸ In my view, however, treating such a measure as extraterritorial is defensible.⁵⁹ The very term ‘outwardly directed’ seems to be an acknowledgement that the primary concern of the ban is with the welfare of persons outside the state’s territory. Given that the whole point of the import ban is to induce a change in the production process, it makes considerable sense to view the US law as an attempt to regulate conduct taking place in another country, and the denial of access to the US market as the enforcement mechanism.

The fact that, in the absence of the GATT, every state would have plenary power under international law to control access to its market cannot suffice to save the import ban from being regarded as extraterritorial under interna-

⁵⁶ *United States – Restrictions on Imports of Tuna*, unadopted, 3 September 1991, DS21/R, BISD 39S/155. Steve Charnovitz has usefully distinguished three categories of PPMs. See generally Charnovitz, ‘The Myth of Illegality’, above n 46. I shall limit my discussion here to the least problematic of these, which he calls ‘how-produced’ PPMs. These consist of restrictions on imports based on the method by which the product was produced. The other two categories are the ‘government policy’ standard and the ‘producer characteristics’ standard, which respectively consist of restrictions based upon laws or regulations of a foreign government regarding the production process, or its enforcement of them, and restrictions based on the identity of the producer or importer. Some of the cases discussed in this section actually involved these broader types of PPMs. I shall discuss them here as if they involved how-produced PPMs and limit my discussion to objections made by the panels and/or Appellate Body that would apply to how-produced PPMs.

⁵⁷ See, e.g., *id.* at 93. A second panel in the Tuna/Dolphin dispute took a somewhat different approach to the jurisdictional question. *United States – Restrictions on Imports of Tuna*, unadopted, 16 June 1994, DS29/R.

⁵⁸ See, e.g., Steve Charnovitz, ‘Dolphins and Tuna: An Analysis of the Second GATT Panel Report’, 24 *Env. L. Rptr.* 10567 at n 76 (1994).

⁵⁹ Lorand Bartels offers additional reasons for reaching the same conclusion in Bartels, above n 9, at 376–90.

tional law notions of prescriptive jurisdiction. The argument proves too much. After all, because of the limits international law places on adjudicatory and enforcement jurisdiction, no law of State A may be enforced by State A against the nationals of State B unless the nationals of State B are present in State A or have assets or are doing business there.⁶⁰ If an environmental PPM is not extraterritorial because it is merely a regulation of access to the domestic market, then any other law of the state may be deemed applicable worldwide on the theory that it, too, is in reality merely a regulation of access to its domestic market.⁶¹ For example, State A might enact a law making it a crime for anyone anywhere to spit on a sidewalk. Because such a law could only be enforced against non-nationals if such persons or their property later entered the territory of State A, the law could be characterized as a regulation of the conditions for entry of persons or property into the territory of State A. If the argument were accepted, however, no law would violate limits on prescriptive jurisdiction; every law could simply be recharacterize as a regulation of access to the regulating state's territory. The very existence of international law limits on prescriptive jurisdiction separate and apart from international law limits on adjudicatory and enforcement jurisdiction shows that concerns about extraterritoriality cannot be made to disappear through such a sleight of hand.⁶²

The fact that a measure is extraterritorial, however, does not mean that it is invalid under international law. International law permits extraterritorial regulation under certain circumstances, such as when the regulated conduct

⁶⁰ Restatement (Third) of Foreign Relations Law § 421 (1986) (listing grounds for jurisdiction to adjudicate); Restatement (Third) of Foreign Relations Law § 431 (1986) (listing grounds for jurisdiction to enforce).

⁶¹ This sort of argument was raised by defenders of the Helms-Burton law. See, e.g., Malcom Wilkey, 'Helms-Burton: Its Fundamental Basis, Validity, and Practical Effect', *ABA Int'l Law News* at 17 (Spring 1997) (arguing that Helms-Burton is not an example of extraterritoriality, 'but the essence of the principle of sovereignty' to control access to national borders). The argument was not widely accepted in that context, however. See, e.g., Organization of American States, Inter-American Juridical Committee, Opinion Examining the Helms-Burton Act, 27 Aug. 1996, 35 I.L.M. 1322 (1996).

⁶² I do not consider here what the right test is to distinguish measures that are extraterritorial in the relevant sense from those that are not. For example, I do not think that the denial of foreign aid to countries that fail to meet certain unilaterally imposed standards would violate international-law limits on legislative jurisdiction. On the other hand, a law making it a crime for non-nationals to do certain things abroad that do not have an effect in the regulating state or threaten its security interests would violate such limits, see note 63 below, even though such a law would only be enforced against persons who set foot in the regulating state. What exactly distinguishes the first case from the second, and whether, in the absence of the GATT, a denial of access to the US market to products made in violation of unilaterally imposed standards would be closer to the first or the second, are extremely complex questions. For an extended discussion and a proposed test, see Bartels, above n 9, at 376–90. I merely note that the PPMs discussed in the text implicate concerns about extraterritoriality and that it seems unlikely that a treaty the purpose of which was to limit the ability of states to impose trade restrictions would bless trade restrictions raising extraterritoriality concerns of that nature.

has substantial effects in the regulating state.⁶³ There is much to be said for reading Article XX in the light of customary international law principles of prescriptive jurisdiction. Given the intensity of the international controversy about the United States' attempts to legislate extraterritorially, it is hard to believe that the members of the WTO would have subordinated the trade rights being recognized in the treaty to a unilateral power of importing countries to prescribe health and sanitary standards abroad for the protection of persons beyond the jurisdiction of the regulating state. It seems much more likely that the parties intended to grant importing states the power to insist on production standards in the exporting state to the extent necessary to protect its own nationals and others subject to its prescriptive jurisdiction under international law. This approach would not prohibit outwardly directed trade restrictions altogether, but it would require a showing that the importing state possessed prescriptive jurisdiction under international law to impose the standard that it is making a condition of access to its domestic market.⁶⁴

The WTO Appellate Body's most recent pronouncement on this issue is not to the contrary. The Shrimp/Turtle case involved a US law banning the importation of shrimp caught in a manner that endangered turtles. The Appellate Body's conclusion that such a ban *prima facie* fit within Article XX(g) has been read as a rejection of the Tuna/Dolphin panel's conclusion

⁶³ Restatement (Third) of Foreign Relations Law § 402(1)(c) (1986). See also *id* at § 402(2) (permitting extraterritorial regulation on the basis of nationality); § 402(3) (permitting extraterritorial regulation over conduct directed against a state's security); § 404 (recognizing universal jurisdiction over limited class of offenses).

⁶⁴ Lorand Bartels similarly argues that Article XX should be interpreted in the light of international law principles of legislative jurisdiction. See Bartels, above n 9. He goes on to argue that those principles permit a state to prescribe rules where it has a 'legitimate interest', *id* at 374, and that all states have a legitimate interest in promoting respect for human rights, *id* at 374. He concludes that Article XX permits a state to impose PPMs for the purpose of promoting respect for human rights in other states, *id* at 402. As Dr Bartels recognizes, *id* at 371 and n 82, this approach to legislative jurisdiction is probably not the prevailing one. It seems to me that the existence of a particular norm of human rights has little bearing, if any, on whether State A has jurisdiction to prescribe rules of conduct for persons in State B. Given that human rights instruments contemplate that states will protect the human rights of persons 'within their territory and subject to their jurisdiction', see International Covenant on Civil and Political Rights, art. 2(1), to argue that the existence of a human rights norm itself provides a basis for extraterritorial legislative jurisdiction seems like bootstrapping. Dr Bartels' argument is also in tension with the fact that a small class of human rights – encompassing 'certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism' – is recognized to give rise to the jurisdiction of states to prescribe when none of the more traditional bases of jurisdiction to prescribe is met. See Restatement (Third) of the Foreign Relations Law of the United States, § 404 (1987). I do not consider here the content of the international law principles on legislative jurisdiction, but I am assuming them to be along the lines set forth in the Restatement (Third), above, §§ 402–04. I consider below the different argument that Article XX permits states to bar the importation of products made in violation of international human rights norms on the theory that, in such circumstances, states are not prescribing rules of conduct for persons in other states, but merely giving effect to independently binding rules.

that Article XX permitted only inwardly directed trade measures.⁶⁵ However, although the Shrimp/Turtle case does make it clear that not all outwardly directed measures are outside the scope of Article XX(g), the Appellate Body expressly left open ‘the question of whether there is an implied jurisdictional limitation in Article XX(g), and, if so, the nature and extent of that limitation’.⁶⁶ According to the Appellate Body, the migratory nature of sea turtles created ‘a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)’.⁶⁷ That the tribunal did not require a showing that all of the individual turtles protected by the ban traversed through US waters at some point in their lives⁶⁸ indicates that Article XX(g) tolerates some degree of outward direction. Nevertheless, the Court’s holding is consistent with a requirement of some jurisdictional nexus between the regulating state and the regulated activity. Moreover, the reasons that may have led the tribunal to accept a loose nexus in the context of Article XX(g) may not apply equally to Articles XX(a) and (b) insofar as the latter two articles apply to people rather than animals or plants.⁶⁹ Ecological factors may well justify the conclusion that all nations have an interest in the preservation of the Ozone Layer or of endangered species. The claim that all nations have an interest in the morals and/or health of all human beings, however, seems to challenge more directly one of the central tenets of international society: the reciprocal bond of allegiance between a state and its nationals.⁷⁰

It might be argued that extraterritoriality shouldn’t be a problem for human rights PPMs, at least to the extent that the predicate for the imposition of the trade measure is the exporting state’s violation of a standard that is binding on the exporting state as a matter of international law. Under such circumstances, the importing state is not unilaterally imposing a rule of conduct on persons in other countries. By hypothesis, the relevant standard is imposed by

⁶⁵ See Jagdish Bhagwati, ‘WTO Afterword: The Question of Linkage’, 96 *Am. J. Int’l L.* 126, 134 (2002) (implying that Shrimp/Turtle overturned Tuna/Dolphin).

⁶⁶ Appellate Body Report Concerning United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, para 133, 12 Oct. 1998 [hereafter Shrimp-Turtle AB/R].

⁶⁷ *Id.*

⁶⁸ See Cleveland, ‘Human Rights Sanctions and the WTO’, above n 54, at 235 n 175 (quoting Shrimp-Turtle AB/R at para 131: ‘it is not claimed that *all* populations of these [turtle] species migrate to, or traverse . . . waters subject to United States jurisdiction.’).

⁶⁹ See Shrimp-Turtle AB/R, para 26 (summarizing the argument made by the United States on appeal, that the US law in question was substantially related to the preservation of the sea turtle species).

⁷⁰ It is true that the emergence of an international law of human rights reflects the understanding that all nations have an interest in the observance of the fundamental human rights of all persons, but Articles XX(a) and (b) sweep more broadly than that, as they clearly permit measures to protect the morals or health of persons even in circumstances not implicating international human rights. For example, they would permit an Israeli ban on non-kosher meat products. See Bartels, above n 9, at 356. I consider below the more limited argument that Article XX should permit outwardly directed measures designed to promote compliance in other countries with internationally recognized human rights norms.

international law to which the exporting state is independently bound, in most cases because it consented to the standard through treaty or over time through the formation of customary international law. On this basis, commentators have argued that Article XX(a) and/or (b) should be interpreted to permit PPMs seeking to induce compliance with universally recognized human rights norms.⁷¹

The solution has considerable appeal. That the predicate of the sanction is the violation of an independently binding norm of international law significantly alleviates the extraterritoriality concern.⁷² Moreover, reading Articles XX(a) or (b) to incorporate the international law of human rights finds some support in the Shrimp/Turtle decision, in which the Appellate Body found it appropriate to interpret Article XX(g) in the light of evolving principles of international environmental law.

On the other hand, a reading of Article XX(g) as incorporating evolving norms of international environmental law is supported by that article's reference to exhaustible natural resources and by the WTO Preamble's reference to sustainable development. The text of Articles XX(a) and (b) do not provide as clear a hook on which to rest a reading of those articles as incorporating the international law of human rights. The provisions are not written as an invitation to Member States to employ trade measures to induce compliance by other states with international human rights norms.⁷³ The articles obviously authorize measures to protect against much more than violations of internationally recognized human rights. The public morality exception by its terms sweeps much more broadly than the international law of human rights, as the concept of morality is broader than that of law (at least

⁷¹ Charnovitz, 'The Moral Exception', above n 54, at 742; see also Cleveland, 'Human Rights Sanctions and International Trade', above n 20, at 157–58; Janelle M. Diller and David A. Levy, 'Child Labor, Trade and Investment: Toward the Harmonization of International Law', 91 Am. J. Int'l L. 663, 682–83 (1997) [hereinafter 'Child Labor']; Salman Bal, 'International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT', 10 Minn. J. Global Trade 62, 108 (2001).

⁷² It does not necessarily eliminate the concern, however. In particular, such import restrictions may interfere with the discretion of other states to the extent the relevant human rights instrument 'leaves it to the States parties concerned to choose their method of implementation in their territories'. See UN Committee on Civil and Political Rights, General Comment 3 to Article 2 of the ICCPR (29 July 1981), available at <[http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CCPR+General+comment+3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CCPR+General+comment+3.En?OpenDocument)>

⁷³ Additionally, some scholars have argued that, to permit states to bar imports made in contravention of human rights norms is improper because it would add a sanction to the human rights norms that states did not agree to when they ratified the instruments recognizing the relevant norm. The claim is that, when states adhered to such instruments, they did so with the understanding that the rights they were recognizing would be enforced in the way specified in the instrument. This argument apparently assumes either that the human rights instruments establish self-contained regimes, cf. above n 40, or that general international law does not generally permit states to take countermeasures in response to another state's violation of the human rights of its own citizens, cf. above n 9. To the extent either assumption is correct, the argument discussed in the text would indeed be subject to this further criticism.

for the positivists among us).⁷⁴ And the exception relating to human life and health on its face sweeps more broadly than human rights, as it covers the lives and health of animals and plants as well.⁷⁵ The substantive breadth of these provisions suggests that they were thought to be limited in their jurisdictional scope – that is, that they were meant to apply only to inwardly directed measures.⁷⁶

The negotiating history offers little to rebut this inference. The negotiating history of Article XX(b) ‘suggests a narrow focus on sanitary and phytosanitary measures’.⁷⁷ There is little direct evidence of what the framers of Article XX(a) intended. Steve Charnovitz has argued that the lack of discussion indicates that the parties ‘knew what it meant’,⁷⁸ and in his view it is reasonable to assume that they understood it to mean the same thing as similar exceptions in prior treaties.⁷⁹ He provides compelling evidence that an exception in the 1927 Convention for the Abolition of Import and Export Restrictions covering ‘prohibitions or restrictions imposed for moral or humanitarian reasons’⁸⁰ was understood to cover outwardly directed trade measures. For example, he cites evidence that the exception was read by US Senators to permit a ban on ‘the importation of goods made under forced or compulsory labor’.⁸¹ It may be significant, however, that the term in the 1927 exception that appeared most directly to permit outwardly directed measures (‘humanitarian’) was omitted from the 1947 GATT.⁸² Charnovitz also uncovers evidence that numerous pre-GATT treaties imposed outwardly directed trade restrictions. However, as he notes, almost all of the examples of outwardly directed measures were also inwardly directed.⁸³ Because the GATT cannot be read to condemn an otherwise valid measure just because it

⁷⁴ See above n 70 (noting that this provision would permit an Israeli ban on the importation of non-kosher meat products).

⁷⁵ In other respects, however, Article XX(b) covers less than human rights, as the international law of human rights addresses matters beyond human life and health.

⁷⁶ With apologies to Steve Charnovitz, I use the term ‘inwardly directed’ in the remainder of this article to include measures by a state designed to protect the morals and health of persons or things that are its legitimate concern under international-law principles of prescriptive jurisdiction. ‘Outwardly directed’ measures are those that seek to protect the morals or health of persons not subject to the regulating state’s prescriptive jurisdiction under international law. As to the content of the relevant limits, see above notes 63 and 64. It is worth recalling here that, under international law, states have universal jurisdiction with respect to a small set of human rights norms, such as those regarding genocide, war crimes, and the slave trade. See *id.*

⁷⁷ Cleveland, ‘Human Rights Sanctions and the WTO’, above n 54, at 237.

⁷⁸ Charnovitz, ‘The Moral Exception’, above n 54, at 705.

⁷⁹ *Id.*

⁸⁰ International Convention for the Abolition of Import and Export Prohibitions and Restrictions, art. 4, para 2, 8 Nov. 1927, 46 Stat. 2461, League of Nations Doc. C.I.A.P. 1927.

⁸¹ Charnovitz, ‘The Moral Exception’, above n 54, at 707.

⁸² *Id.* at 717.

⁸³ Charnovitz, ‘The Moral Exception’, above n 54, at 713–17.

is in part outwardly directed,⁸⁴ the fact that pre-GATT treaties permitted measures that were simultaneously outwardly and inwardly directed does not appear to support the argument that purely outwardly directed measures fall within the Article XX exceptions.

In sum, the negotiating history does not offer a strong basis for rejecting an inference from the substantive breadth of these articles that the exceptions are addressed to inwardly directed measures. The attempt to read these articles as permitting states to impose outwardly directed measures if, but only if, a violation of international human rights norms is the predicate for the trade measure strikes me as an attempt to fit a square peg into a round hole.⁸⁵ On the other hand, the same might be said of much of the Appellate Body's reading of Article XX's chapeau in *Shrimp/Turtle*. Its acceptance of this reading of Articles XX(a) and (b) thus cannot by any means be ruled out.

If the extraterritoriality problem could be overcome, human-rights-based PPMs would have to confront additional obstacles imposed by Articles XX(a) and (b) and the chapeau of Article XX. I shall discuss here only the most significant of these, the 'necessity' requirement of Articles XX(a) and (b).⁸⁶ As noted, Articles XX(a) and (b) authorize only measures that are 'necessary' to protect public morals or human life or health. The Appellate Body has interpreted this concept stringently, reading it to require that a trade measure be the least trade-restrictive measure effective to promote the state's valid interest.⁸⁷ As Sarah Cleveland notes, few if any human-rights-based measures would satisfy this requirement, given the availability of other ways to seek to

⁸⁴ A ban on the slave trade (one of Charnovitz's examples) would clearly fall within Article XX(a) because it serves to protect the morals of persons in the importing state (see Charnovitz, 'The Moral Exception', above n 54, at 714–15). The fact that it also protects the lives and health of prospective slaves abroad does not make the measure invalid. Some scholars have claimed that a ban on the importation of the products of child labor can be regarded as inwardly directed as well because it is designed to avoid domestic support for or complicity in the underlying human rights violation. See, e.g., Cleveland, 'Human Rights Sanction and International Trade', above n 20, at 138–39. In my view, however, there are pertinent distinctions between the two. If owning a product made abroad with child labour is immoral, it is immoral because it supports or encourages child labour abroad. Owning slaves, on the other hand, is immoral because of its effects on persons within the country.

⁸⁵ So read, the provision would permit a state to impose standards necessary to protect the morals or health of their citizens or others subject to their legislative jurisdiction, even if those standards have nothing to do with internationally recognized human rights, but would allow measures intended to protect the morals or health of persons not subject to their legislative jurisdiction only if the predicate for the PPM is a violation of an internationally recognized human right.

⁸⁶ For a discussion of the others, see Cleveland, 'Human Rights Sanctions and International Trade', above n 20, at 157–81.

⁸⁷ Report of the Appellate Body in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (AB-2000-11) at para 170 (measure is 'necessary' under Article XX(b) 'only if there were no alternative measure consistent with the General Agreement, or less inconsistent with which, ... could reasonably be expected ... to achieve [the relevant] policy objectives').

advance human rights.⁸⁸ An inquiry into whether a human-rights-based trade measure is ‘necessary’ to protect morals or health in the exporting state implicates the debate about whether economic sanctions are at all effective in achieving their asserted goals.⁸⁹ It seems highly unlikely that the WTO agreements were meant to establish a test that calls for a resolution of this issue as well as the question whether alternative mechanisms would be more effective. This may suggest that the Appellate Body has adopted too stringent a definition of the ‘necessity’ standard and should adopt one more akin to how the US Supreme Court has interpreted ‘necessary and proper’ in the US Constitution.⁹⁰ On the other hand, the term ‘necessary’ appears in these articles unaccompanied by the softer term ‘proper’.⁹¹ The use of this term may thus confirm that Articles XX(a) and (b) were never meant to authorize the protection of the morals or health of persons beyond a state’s prescriptive jurisdiction.

The foregoing analysis should suffice to show that a defense of human rights PPMs as GATT-consistent would be an uphill battle, to say the least. If such tailored sanctions are indeed GATT-inconsistent, an argument of another sort might save a subset of them. In defending the US law banning imports of the products of indentured child labor, some scholars have pointed out that the use of forced or indentured child labor is not just a violation of international law, but a violation of *jus cogens*.⁹² A *jus cogens* norm is a norm that cannot be evaded even by treaty. In the event of a conflict between a treaty norm and a *jus cogens* norm, the *jus cogens* norm prevails. For this reason, it has been suggested, the WTO Dispute Settlement Body should uphold the US law notwithstanding its nonconformity with the GATT.⁹³

I am not so sure. Even if the international norm concerning child labor has the status of a *jus cogens* norm, it does not necessarily follow that the GATT is invalid insofar as it prohibits a ban on the importation of products made in violation of that norm. The answer depends on the nature of the child labor prohibition under international law. Normally, international legal norms apply only to the conduct of states, not private parties.⁹⁴ Thus, it might have

⁸⁸ Id. at 241.

⁸⁹ See generally Gary C. Hufbauer, *Economic Sanctions Reconsidered: History and Current Policy*, above n 18; Hufbauer, *The Costs of U.S. Trade Barriers* (Washington, DC: Institute for International Economics, 1993); Richard Parker, ‘The Problem with Scorecards: How (and How Not) to Measure the Cost-Effectiveness of Economic Sanctions’, 21 Mich. J. Int’l L. 235 (2000).

⁹⁰ See *McCulloch v Maryland*, 17 U.S. (4 Wheat) 316, 324 (1819) (interpreting ‘necessary’ in that clause to mean ‘appropriate’). Cf. Cleveland, ‘Human Rights Sanctions and International Trade’, above n 20, at 164.

⁹¹ Cf. *McCulloch*, 17 U.S. at 324–25 (using the term ‘proper’ to clarify the meaning of ‘necessary’).

⁹² See Diller and Levy, ‘Child Labor’, above n 71, at 678.

⁹³ See generally id.

⁹⁴ See Joseph Brierly, *The Law of Nations* (6th edition, 1963) (offering the classic definition of international law as ‘the body of rules and principles of action which are binding upon civilized states in their relations with one another’).

been the case that international law only prohibits *governments* from making use of child labor. On this view, there would be no violation of international law when a private party uses child labor. But the international norm on child labor is broader: it requires states to ban the use of child labor by private parties.⁹⁵ Thus, a state violates international law if it does not ban the use of child labor, or if it does not effectively enforce the ban. The GATT would be in conflict with such a norm only if it prohibited states from banning child labor. But it does not; it prohibits states, at most, from *banning the importation* of products made with child labor. The GATT would be in conflict with a *jus cogens* norm only if the *jus cogens* norm *required* countries to ban the importation of goods made with child labor. It is not clear that the *jus cogens* norm relating to indentured child labor goes that far. It may simply require countries to make it illegal for their citizens, or persons operating within their territory, to use child labor.

There would perhaps be a conflict if the *jus cogens* norm prohibited any conduct that *encourages or supports* child labor. It might then be argued that allowing the importation of goods made with child labor conflicts with the *jus cogens* norm because such importation has the effect of encouraging or supporting the use of child labor in the exporting country. But this seems like a slippery slope. Are countries required to prohibit all imports from the exporting country (even of goods not made with child labor)? After all, a total embargo is even more likely to induce the exporting country to prohibit child labor than is a ban on the importation of one product. On this view, failure to impose a complete embargo would be tantamount to ‘encouragement’ or ‘support’ of child labor. Why stop there? Perhaps the *jus cogens* norm requires the importing country to invade the exporting country, annex its territory, and directly enforce a ban on child labor. This suggestion is of course absurd, but it serves to illustrate a broader point. Care must be taken in ascertaining the addressee of the *jus cogens* norm and its scope. As a general matter, international law has not imposed any particular duties on states concerning how to react to violations of international law by other states.⁹⁶ In theory, this could change. Limited exceptions already exist. For example, nations are required to abide by trade sanctions imposed by the Security Council,⁹⁷ and the ICJ indicated that states had a duty not to recognize certain acts of the

⁹⁵ ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention 182), 17 June 1999, available at <http://www.ilo.org> (accessed 9 June 2002). International law may only ban the use of certain forms of child labor. See *id.* (banning the use of the worst forms of child labor). References to child labor in the text should be understood as references to the forms of child labor prohibited by international law.

⁹⁶ Louis Henkin, ‘Act of State Today: Recollections in Tranquility’, 6 *Colum. J. Transnat’l L.* 175, 181 (1967) (observing that states may acquiesce in or even applaud another state’s violation of international law).

⁹⁷ UN Charter, art. 25.

illegal South African regime in Namibia.⁹⁸ A more general norm of international law could conceivably develop requiring states to respond in certain ways to other states' violations of international human rights norms having the status of *jus cogens*. Conceivably, this secondary norm could itself achieve the status of a *jus cogens* norm. But it is far from clear that a *jus cogens* norm has emerged yet requiring states to ban the importation of the products of child labor.

B. General sanctions

The debate about the GATT-consistency of human-rights-based sanctions has revolved to such a degree around the question of PPMs – i.e., tailored sanctions – that some commentators appear to have forgotten that most human rights sanctions have historically been general sanctions.⁹⁹ Given that '[g]eneral . . . sanctions are the most common type of human rights trade measure',¹⁰⁰ even if the debate were resolved in favor of the validity of human rights PPMs, the GATT would represent a substantial contraction of the remedies available to address human rights violations if it prohibited general human rights sanctions. Most human rights violations do not culminate in a product, let alone a product that is imported or exported. If the GATT/WTO precluded all but tailored sanctions, it would greatly reduce the availability of trade measures as mechanisms for giving efficacy to human rights norms.

The contestability of the case for human-rights-based PPMs bodes ill for the case for general human rights sanctions. I shall consider here three sorts of arguments that might be advanced to show the GATT-consistency of such sanctions.

The first argument is that general sanctions fall within the Article XX exceptions for public morals and/or human life or health. Although most of the debate surrounding these exceptions revolves around the validity of PPMs, the strongest arguments for accepting PPMs would also justify general human rights sanctions. To overcome the extraterritoriality problem that concerned the Tuna/Dolphin panel, defenders of human-rights-based PPMs note that human rights norms are independently binding on exporting states. If Articles XX(a) and (b) permit measures designed to protect public morals or the health of persons in the exporting states by deterring the violation of human rights in such countries, it is unclear why these articles would only permit such protection through restrictions on the importation of products themselves tainted by such human rights violations. The relevant question

⁹⁸ See Schachter, above n 8, at 198.

⁹⁹ See Francesco Francioni, 'Environment, Human Rights and the Limits of Free Trade', in *Environment, Human Rights and International Trade* at 17 (arguing that '[i]mport restrictions based on human right considerations are, by definition, almost always based on the manner in which products are made.').

¹⁰⁰ Cleveland, 'Human Rights Sanctions and the WTO', above n 54, at 142 (emphasis omitted).

under the texts of those provisions is whether the measure is necessary for the protection of morality or health in the exporting country. As noted, the question of necessity largely reduces itself to a question of effectiveness. Banning the importation of products unrelated to the violation will often be more effective at stopping the violation than banning the importation of a related product. The case for interpreting Articles XX(a) and (b) as permitting measures necessary to protect the internationally recognized human rights of persons in the target state thus seems not to support a distinction between tailored sanctions and general sanctions.

On the other hand, Article XX's chapeau would appear to present significant problems for the sort of general sanctions that have typically been used by the United States. Even measures that otherwise would fall within Article XX(a) or (b) would be valid only if they also satisfied the chapeau's requirement that the measures 'not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail'. This requirement would present severe problems for general sanctions as applied by the United States. Such sanctions are usually country-specific. The United States would have a hard time arguing that its sanctions apply equally to all countries where the same conditions prevail. The divergent approaches to economic engagement employed in the case of China as compared to the case of Cuba are only the most obvious examples of what would probably be regarded as discrimination under the chapeau's standard. It is likely that the chapeau would condemn any country-specific sanctions regime, requiring general sanctions to be generally framed. The nondiscrimination standard it imposes is, in any event, one that would not be satisfied by the current US sanctions regime nor, given the politics of economic sanctions, by any sanctions regime that could conceivably be enacted in the United States.

The second argument for sustaining general sanctions would rely on the exception in Article XXI for 'any action which [a contracting party] considers necessary for the protection of its essential security interests . . . taken in time of war or other emergency in international relations'. Under US domestic law, the statutory authority for many of the general human rights sanctions imposed by the United States is the International Emergency Economic Powers Act (IEEPA), which authorizes the President to take a broad array of actions.¹⁰¹ The recently imposed sanctions against Burma, for example, were

¹⁰¹ See 50 U.S.C. § 1702(a)(1) (authorizing the President in times of a declared emergency to: '(A) investigate, regulate, or prohibit (i) any transactions in foreign exchange, (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof, (iii) the importing or exporting of currency or securities, by any person, or with respect to any property, subject to the jurisdiction of the United States; (B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any

based in part on IEEPA.¹⁰² It was on the basis of the GATT's security exception that the United States defended the sanctions imposed upon Cuba in the Helms-Burton legislation when they were challenged by the European Union.¹⁰³

The link between human rights and national security has become considerably more evident after the attacks on the United States on 11 September 2001. Nevertheless, it seems difficult to regard the human rights situation in such countries as Burma as involving the essential security interests of the United States or an 'emergency in international relations'. The President's success in imposing such sanctions pursuant to IEEPA probably has more to do with the extreme deference the US judiciary affords the President in matters of international relations, and the barriers to mounting a judicial challenge to such an action, than to anyone's belief that these situations involve essential security interests or an emergency of any kind.

It is true that Article XXI(b) also contemplates judicial deference of a sort. Some have argued that, because the exception covers any measures that the relevant Member 'considers necessary' to protect its national security interests, the exception is self-judging and thus unreviewable by a WTO panel.¹⁰⁴ Others claim that some degree of review is appropriate and required. Whether or not their measures can be judicially challenged, however, states have an interest in maintaining the integrity of the GATT, including the national security exception. The abuse of any provision threatens the whole structure in much the same way as the failure to abide by the judgments of the Dispute Settlement Body. That the matter will not be successfully attacked in litigation is thus not a completely satisfying response to those who contend

foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States; and (C) when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals, confiscate any property, subject to the jurisdiction of the United States, of any foreign person, foreign organization, or foreign country that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States; and all right, title, and interest in any property so confiscated shall vest, when, as, and upon the terms directed by the President, in such agency or person as the President may designate from time to time, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes.').

¹⁰² Exec. Order No. 13,047, 62 Fed. Reg. 28301 (20 May 1997).

¹⁰³ See Antonio F. Pérez, 'WTO and U.N. Law: Institutional Comity in National Security', 23 *Yale J. Int'l L.* 301, 304 (1998) [hereinafter 'WTO and U.N. Law']. The challenge was eventually withdrawn.

¹⁰⁴ This was the United States position when Helms-Burton was challenged. See *id.* at 305.

that human rights related trade sanctions imposed on them are not in fact justified under Article XXI(b).¹⁰⁵

Sarah Cleveland has made a persuasive case for regarding the most severe sorts of human rights abuses as 'emergencies in international relations' sufficient to trigger the essential security exception. She argues that, in the light of 'the extent to which human rights violations are now recognized as the concern of all states',¹⁰⁶ 'a twenty-first century definition of international emergencies should include systematic violations of *jus cogens* norms, wherever they occur.'¹⁰⁷ The problem, however, is that Article XXI(b) requires not just an international emergency but also a threat to the sanctioning state's essential security interests. As horrifying as the events in Rwanda and Somalia were, they can be said to threaten the 'essential security interests' of nations like the United States only if we so stipulate. This result may well be 'illogical' and 'absurd',¹⁰⁸ but that would appear to be an argument for amending the security exception rather than for reading the term 'essential security interests' out of it. It is also true that the international community 'increasingly has been willing to recognise *jus cogens* human rights atrocities as matters which threaten international security and warrant economic, humanitarian, and even military intervention ...'.¹⁰⁹ But if the international community in the form of the Security Council authorizes such measures for such reasons (or others), the measures would be valid under Article XXI(c). In any event, the arguments advanced by Prof. Cleveland would bring within the scope of Article XXI(b) only a small subset of the general human rights sanctions that have been imposed over the years.

¹⁰⁵ The related arguments advanced by Jeffrey Dunoff and Joel Trachtman are subject to similar objections. Dunoff has argued that cases presenting questions involving the linkage of trade to such non-trade matters as human rights should be dismissed by WTO panels as involving political questions. See Jeffrey Dunoff, 'The Death of the Trade Regime', 10 Eur. J. Int'l L. 733 (1999). If what he has in mind is that any challenge to a measure that is defended on the basis of a non-trade value such as human rights should be dismissed on this basis, his solution is similar to a dismissal of the claim under Article XXI(b) on the ground that the panel lacks the power to review the invocation of this self-judging provision, and thus raises the same threat to the system. Joel Trachtman appears to believe that human rights sanctions are GATT-inconsistent but he suggests that a state that wishes to impose such sanctions would be justified in engaging in a form of civil disobedience, at least temporarily. See Joel P. Trachtman, *Unilateralism and Multilateralism in U.S. Human Rights Laws Affecting International Trade*, paper prepared for World Trade Forum, 14–16 Aug. 2001 (21 May 2002). Disobedience is the same as violation, and it would pose the same threat to the integrity and continuing viability of the WTO regime as abuses of the security exception. Moreover, reliance on such disobedience is problematic because as a practical matter it can only be employed by economically powerful states that do not fear retaliation in the form of counter-measures. Nevertheless, for reasons discussed below, reserving Article XXI(b) as a safety valve for addressing the most egregious human rights violations might be the least bad option.

¹⁰⁶ Cleveland, 'Human Rights Sanctions and International Trade', above n 20, at 185.

¹⁰⁷ Id at 186.

¹⁰⁸ Id at 185.

¹⁰⁹ See Cleveland, 'Human Rights Sanctions and the WTO', above n 54, at 257.

If human rights sanctions were indeed to be imposed by states and defended through an evidently strained interpretation of Article XXI(b), and adjudication of their validity were successfully avoided on the theory that the exception is self-judging, it is possible that this development would not be viewed by states as a threat to the integrity of the GATT. (It has been suggested to me that the real reason the European Union dropped its challenge to Helms-Burton was that no one, least of all the European Union, wanted the effective scope of Article XXI(b) adjudicated.¹¹⁰) But, if so, the reason would most likely be that the Members regard the WTO as an instrument for the discipline of trade measures taken *for protectionist purposes*. Measures such as the sanctions against Burma and Cuba have evidently been taken for non-protectionist reasons, good or bad. This insight leads to the final, and perhaps most controversial, argument for accepting the validity of human-rights-based trade measures: such measures are GATT-consistent because the GATT was never intended to – and thus does not – deny states the power they otherwise possessed under international law to employ such sanctions as counter-measures in response to violation of international human rights norms by other states.

Although this argument has been advanced by few commentators,¹¹¹ it appears to capture the essence of the case some commentators have made for a broad interpretation of Article XX. For example, arguing that the GATT should be '[i]nterpret[ed] . . . to be consistent with international law',¹¹² Sarah Cleveland has defended an interpretation of Articles XX(a) and (b) that would permit general human rights sanctions. The argument proceeds in two steps,

- (a) Customary international law allows for the use of unilateral economic measures to promote the human rights system. . . . States are recognised as having an interest in prohibiting such conduct without any territorial nexus. Moreover, the *erga omnes* status of human rights norms establishes that all states have an interest in compelling compliance with human rights by other states, regardless of whether the violating state's conduct directly impacts other states' interests in the traditional sense.¹¹³

¹¹⁰ Cf. John H. Jackson, 'World Trade Rules and Environmental Policies: Congruence or Conflict', 49 Wash. & Lee. L. Rev. 1227, 1254, n 68 (1992).

¹¹¹ An argument along these lines was suggested by Mary Ellen O'Connell in the context of environmental PPMs. See Mary Ellen O'Connell, 'Using Trade to Enforce International Environmental Law: Implications for United States Law', 1 Ind. J. Global Stud. 273 (1994). See also Javier Fernández Pons, 'Self-Help and the World Trade Organization', in Paolo Mengozzi, (ed), *International Trade Law on the 50th Anniversary of the Multilateral Trading System* (Milan: A. Giuffrè, 1999) at 94–104.

¹¹² Cleveland, 'Human Rights Sanctions and International Trade', above n 20, at 152. See also Diller and Levy, 'Child Labor', above n 71, at 695 (observing that the 'ordinary meaning' of the GATT regime in light of its object and purpose reveals that the treaty is not intended to override fundamental human rights protections').

¹¹³ See Cleveland, 'Human Rights Sanctions and the WTO', above n 54, at 236–37.

and

(b) Nothing in the GATT text purports to override these international law principles.¹¹⁴

The first set of reasons for concluding that Articles XX(a) and (b) apply to extraterritorial measures appears to be a statement and explanation of the power of states to employ countermeasures under customary international law despite the fact that human rights violations by definition do not injure the state taking the measure in the traditional way. It is an elaboration of general international law about human rights countermeasures.¹¹⁵ The second step in the analysis explains why the power to impose such countermeasures should be understood to remain available. The reason is that the parties to the GATT did not intend to do away with the power.

The argument in this form seems to have little relation to Articles XX(a) and (b). It is, rather, an argument that the GATT does not take away the ability of states to employ economic sanctions in response to human rights violations because there is no evidence in the text or negotiating history that the parties meant to take this power away. This argument is more elegant than the one relying on Articles XX(a) or (b), as it does not require an awkward attempt to shoehorn the international law of human rights into articles about the simultaneously broader and narrower concepts of morality, life, and health. It faces considerable obstacles, however.

First, it is not the case that there is nothing in the GATT's text that purports to override the power to impose trade-related countermeasures. Article XI, for example, is written broadly as a prohibition of all quantitative restrictions. Read literally, this article would take away the power of states to employ such restrictions in response to human rights violations unless the restriction falls within an exception. Given these and other general provisions that on their face apply to human-rights-based trade sanctions, the argument must take a slightly different form. It would have to rely on the principle of interpretation under which 'a treaty ought to be so interpreted as to harmonize as far as possible with existing rules of international law'.¹¹⁶ This principle is related to but not the same as, the rule that one seeks through interpretation to avoid conflicts among various rules of international law if at all possible. The latter rule is not strictly speaking implicated in this situation because, as discussed above, there is no conflict between an international-law rule recognizing a power to employ trade sanctions in response to a human rights violation and

¹¹⁴ Id at 237.

¹¹⁵ As noted above, however, it is not clear that general international law recognizes the right of all states to take countermeasures in response to all violations of international human rights norms. See above n 9.

¹¹⁶ Lord McNair, *The Law of Treaties* (Oxford: Clarendon, 1961) 463 n 3 (citing *The Lusitania*, A.D. 1923-4 No. 196).

a treaty that agrees not to exercise that power. The relevant rule of interpretation is akin to the domestic law rule against implied repeals: in the absence of clear evidence that the legislature intended to repeal a statutory provision granting a power, a subsequent statute will be interpreted in such a way as to preserve the power.¹¹⁷ Similarly, in the absence of clear evidence that the parties intended the contrary, a subsequent treaty will be interpreted in such a way as to preserve powers granted to states by previous treaties or rules of customary international law.¹¹⁸

Under even the most robust approach to this rule of interpretation, however, the argument would fail if the text or negotiating history of the GATT/WTO revealed that the treaty was in fact understood by its framers to be a comprehensive regulation of the parties' ability to employ trade measures in their relations. The argument for treating the GATT/WTO as non-comprehensive would be based on the proposition that the parties to the treaty were concerned with the use of trade measures for protectionist reasons, not with the use of such measures for non-commercial reasons such as concerns about human rights. Whether this is accurate, however, is debatable.¹¹⁹ The Preambles to the GATT and the WTO agreements reveal that the concerns of the Member States extended to such non-commercial matters as 'raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand . . . , while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment . . . '. Moreover, the inclusion of numerous exceptions in Articles XX and XXI of the treaty tends to negate the existence of other exceptions, under the maxim *expressio unius est exclusio alterius*. The exception in XXI(c) for measures authorized by the Security Council is particularly revealing of the framers' intent to regulate comprehensively the Members States' power to employ trade measures. Additionally, Article XXIII of the GATT, which sets out a complaint procedure for states who believe their expected benefits under the GATT were nullified or impaired by another Member's action 'whether or not it conflicts with the provisions of this Agreement'¹²⁰ tends strongly to support an interpretation of the GATT as comprehensive in its regulation of the Members' trade relations.

¹¹⁷ Joseph T. Latronica writes in *Am. Jur. 2d on Treaties* that 'repeals by implication are never favored, and a later treaty or statute will not be regarded as repealing an earlier enactment by implication unless the two are absolutely incompatible and the latter cannot be enforced without antagonizing the earlier'. See 74 *Am. Jur. 2d Treaties* § 21 (2001), citing *Johnson v Browne*, 205 U.S. 309 (1907); *U.S. v Lee Yen Tai*, 185 U.S. 213 (1902); *John T. Bill Co. v U.S.*, 104 F.2d 67 (C.C.P.A. 1939).

¹¹⁸ As framed by Lord McNair, the pertinent rule is that 'express terms [are necessary] to alter an existing rule of law'. McNair, above n 109, at 463 (capitalization and italicization omitted).

¹¹⁹ Pérez, 'WTO and U.N. Law', 23 *Yale J. Int'l L.* at 306 (summarizing the alternative views).

¹²⁰ GATT 1994, art. XXIII(1)(b).

At any rate, the significance of the rule of interpretation favoring a construction that does not implicitly repeal a pre-existing rule of international law is offset in this case by the so-called 'rule of effectiveness', which disfavors a construction that would 'deprive [a treaty] of the effect which the expressed intention of the parties desired for it'.¹²¹ This rule appears to be relevant to the argument under consideration in two ways. First, it is clear that the parties intended at least to prohibit protectionist trade measures. Many measures imposed purportedly for human rights reasons – for example, a ban on the importation of the products of child labor – have protectionist effects and thus possibly a protectionist purpose. A test that requires the disentangling of altruistic from protectionist motivations or effects may thus be unworkable, seriously reducing the effectiveness of the treaty at achieving its (by hypothesis) limited purpose. States desiring a workable regime may well have preferred a complete ban on such measures for prophylactic reasons.

Second, the argument based on the rule against implied repeals cannot easily be limited to countermeasures taken in response to human rights violations. The argument appears to be that the GATT should not be construed to bar countermeasures otherwise permitted by international law except to the extent there is specific evidence that the parties intended to bar such countermeasures. Before the GATT, however, trade countermeasures were permitted by customary international law (subject to rules about necessity and proportionality) in response to the violation of *any* rule of international law (except one that was part of a self-contained regime). If the GATT were interpreted to prohibit only trade measures taken for protectionist purposes, then trade measures would remain available in response to the violation of a wide array of international legal norms. States would enjoy a host of opportunities to circumvent GATT disciplines, and the effectiveness of the regime would accordingly be significantly reduced.

In sum, the breadth of this third argument for upholding general sanctions makes it unappealing to anyone seeking to preserve the effectiveness of GATT disciplines. The first argument would be the most appealing from this perspective, as it would permit externally directed trade measures only to the extent necessary to enforce international human rights norms (and presumably also international norms relating to the environment). However, it appears that, in the light of the nondiscrimination requirement of the chapeau, Articles XX(a) and (b) would effectively permit, at best, only a small range of the general sanctions that are typically employed today. The second argument, relying on the exception for essential security interests, is as a substantive matter the narrowest basis for upholding general sanctions. On the other hand, the self-judging nature of the exception renders it potentially subject to great abuse. Ironically, however, the recognition that it is subject to abuse may ensure that the exception is invoked only in truly exceptional cases.

¹²¹ McNair, above, at 383.

If the concern is to leave open a safety valve for the most egregious of human rights violations, invoking the self-judging exception of Article XXI(b) for such situations may be the best option, even if admittedly an extralegal one.¹²² Interpreting Article XXI(b) in this way may be a defensible response to the Security Council's unreliability in exercising its monopoly under Article XXI(c), much as the norms concerning the use of force have (arguably) evolved to compensate for the Security Council's unreliability in exercising that analogous monopoly.¹²³

III. FUTURE

In this section, I examine a number of ways in which the WTO might in theory approach the trade-human rights linkage. I shall begin with the options that would give the WTO a strong role in directly protecting human rights, and I shall work my way to approaches that would give the WTO little or no role in this regard. Although my focus is on the normative appeal of the various options, I shall not examine the options in a political vacuum. Although I shall not offer a sophisticated political analysis, I shall take into account whether the options would actually ever be seriously considered.¹²⁴ My aim is not to reach definitive conclusions so much as to identify potentially fruitful avenues for further research.

I consider four categories of options:

1. The first set of options would be to give the WTO the power to enforce all international human rights norms through the mandatory imposition of trade measures against states that violate such norms. A weaker variant of this option would be to empower the WTO to enforce certain specified categories of human rights by imposing mandatory trade sanctions.

¹²² This option thus resembles Joel Trachtman's suggestion that civil disobedience may be the best solution to this problem. See n 105 above.

¹²³ For example, seemingly exorbitant interpretations of the concept of 'self-defense' have been invoked and arguably accepted by the international community. On the other hand, some scholars cite such exorbitant claims, and outright violations, as evidence that the UN Charter's norms concerning the use of force have lost their force. See Michael J. Glennon, 'How War Left the Law Behind', *N.Y. Times* (21 Nov. 2002), at A33; Thomas M. Franck, 'Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States', 64 *Am. J. Int'l L.* 809 (1970). The danger, of course, is that exorbitant invocations of the national security exception will give rise to similar claims that the WTO is dead.

¹²⁴ The discussion in this Part should be understood to be relevant to the questions examined in Part II as well. To the extent the text and negotiating history fail to resolve those questions, it may well be appropriate to prefer the interpretation that produces the best outcome, all things considered. Although the Vienna Convention does not list policy as a relevant factor in treaty interpretation, policy analysis might well be relevant under the rubric of context, as well as under rules of interpretation such as the rule of effectiveness. But cf. McNair, above n 116, at 383 (criticizing the rule of effectiveness). Of course, policies often clash, and it will often be impossible to ascertain what the best policy is on a given question or which among the various eligible interpretations would produce the best outcome.

2. The second option would be to make compliance with international human rights a condition of admission to the WTO club.
3. The third set of options would permit but not require states to impose either general or tailored trade sanctions on states that have violated human rights norms. There are a number of possible variations. The sanctions might or might not be limited by a nondiscrimination norm that would effectively preclude country-specific sanctions. More or less stringent versions of necessity and proportionality requirements might be imposed. A more limited version of this option would permit states to impose trade sanctions for the violation of certain specified categories of human rights violations.
4. The final option would deny states all power to depart from WTO disciplines for the purpose of improving human rights conditions in other countries. Under this option, states would be prohibited from imposing either general or tailored sanctions; if they do impose such sanctions, they would be violating their GATT obligations and thus would themselves be subject to trade sanctions (countermeasures).

My discussion will assume that whatever regime is adopted would be subject to the current WTO dispute settlement process, including WTO panel adjudication and Appellate Body review. It would of course be possible for the Members to adopt any of the foregoing approaches and insulate any measures from review. Indeed, the WTO dispute settlement process is currently undergoing review and may well change significantly.¹²⁵ For simplicity's sake, however, I shall assume the continuation of the current dispute settlement system in more or less its current form.

Option One. The first option appears to be an attempt to harness the dispute settlement system of the WTO in the service of international human rights.¹²⁶ It reflects what has been termed 'penance envy'¹²⁷ – that is, the human rights community's frustration and dissatisfaction with the fact that the trade system is endowed with a vigorous and well-developed dispute settlement regime while the enforcement system of the human rights regime is comparatively flaccid.

The suggestion that human rights should penetrate the trade enforcement regime in this way seems destined to misfire, however. As discussed in Part I, the comparatively more effective dispute settlement process of the trade

¹²⁵ See Doha WTO Ministerial Declaration, para 30, 14 Nov. 2001, WTO Doc. No. WT/MIN(01)/DEC/1, available at <http://www.wto.org> (accessed 19 May 2002) (calling for study of improvements and clarifications in DSU procedures by 2003).

¹²⁶ See, e.g., Patricia Stirling, 'The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization', 11 Am. U.J. Int'l L. & Pol'y 1 (1996).

¹²⁷ See José E. Alvarez, 'Foreword', 96 Am. J. Int'l L. 1, 2 & n 4 (2002) (attributing term to Joel Trachtman).

regime may not be the cause of the comparatively better record of compliance with trade norms than with human rights norms. It may just reflect the comparatively stronger commitment of the international community to strict compliance with trade norms than with human rights norms. Indeed, the WTO's regime for maximizing compliance with the decisions of the DSB is not significantly more coercive than the international legal system's default regime for enforcing compliance with legal norms generally. The WTO ultimately relies on a system of trade countermeasures. The reason compliance with DSB judgments is as good as it is may be that the Members of the WTO value the benefits they receive from the system as a whole and fear that non-compliance would threaten it. If the international community is not similarly committed to strict compliance with human rights norms, then, rather than increasing compliance with human rights norms, adding international human rights to the WTO's jurisdiction may well produce more violations of DSB judgments and thus ultimately threaten the viability of the trade dispute settlement system.

In any event, there is virtually no chance that this proposal would ever be adopted. Under the strong version of this option, the WTO would attain the power to halt trade of any given good or service with any given state if it finds that the state has violated international human rights norms. Given the breadth of international human rights law and the vagueness of much of it, that would be a fearsome power. The fears that the United States has expressed of abuse of the International Criminal Court, whether or not well founded, would be miniscule by comparison.

The problem would become even more acute if the trade regime succeeded in its aims. Underlying the case for trade liberalization is the idea that all nations would be better off if states specialized in producing those products and providing those services in which they have a comparative advantage. The world foreseen by the international trade regime, therefore, is a world in which all nations produce a limited range of products and depend on other nations to provide them with other essential goods and to purchase the goods they do produce. Trade liberalization, in other words, increases the interdependence of states – one of the features of the phenomenon known as globalization. The aim of such liberalization is, indeed, to speed this process up. This has already been achieved to a significant extent. Thus, even today, the power of an international institution to impose mandatory multilateral trade sanctions would probably amount to the power to destroy states. In a fully globalized world, such a power would be all the greater. Fears of GATTzilla would be replaced by a terror of an even more fearsome WTOgre. Visions of black helicopters would prevent the international community from even considering the creation of such a monster.¹²⁸

¹²⁸ The lack of institutional expertise in the WTO on human rights is an additional argument against the proposal. It is discussed below in connection with the third option.

A weaker version of this proposal would be to empower the WTO to impose mandatory multilateral trade sanctions in response to the violation of certain specified human rights norms. The more restricted the list of human rights and the more egregious the violations included on the list, the more likely the proposal is to be taken seriously. By specifically enumerating the human rights involved, we would be eliminating the problem posed by the breadth and vagueness of human rights norms. But the power to impose mandatory embargoes would still be fearsome, especially in the globalized future foreseen by the advocates of free trade. We already have a body empowered to impose such embargoes – namely, the Security Council. True, the Security Council is frequently incapacitated, but that is evidence that the international community will not tolerate an effective delegation of this power to an international organization of any sort. Given the absence of will to augment the power of the Security Council or to disencumber it from its paralysis, it is difficult to believe that the international community would be willing to give parallel powers to the WTO. If it were deemed desirable that the power exist somewhere, the Security Council would likely, and probably correctly, be seen as its most suitable repository.

Option Two. The second option would be to make compliance with human rights norms a condition of admission into the WTO.¹²⁹ Perfect compliance could of course not be required, as no state complies perfectly with its human rights obligations, but perhaps a minimum standard could be required. The European Union takes human rights into account in deciding whether to admit new members,¹³⁰ and this approach may be under consideration for the Free Trade Area of the Americas.¹³¹ A glimpse at the most recent list of WTO Member States shows that this approach is not followed by that organization.¹³²

Upon analysis, however, it appears that this proposal will tend to reduce itself to some version of the third option discussed below. If adherence to a minimal level of human rights protection were made a condition of admission into the WTO club, it would also have to be made a condition of continuing membership. If it were made a condition of continuing membership, there would have to be some mechanism for enforcing the requirement. One possibility would be to make expulsion or suspension the sanction for failure to maintain the requisite standards. Expulsion and suspension, however, are

¹²⁹ Cf. Robert Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading Regime', 96 Am. J. Int'l L. 94, 114 (2002) (noting proposals to make adherence to labor and environmental codes a condition of membership in the WTO).

¹³⁰ See Treaty on European Union, 2 Oct. 1997, art. 49, O.J. (C 340) 145 (1997) (referring to art. 6(1), which calls for respect of human rights).

¹³¹ See Frank J. Garcia, 'Trade, Constitutionalism and Human Rights: An Overview', in *Human Rights, Terrorism and Trade*, 96 Am. Soc'y Int'l L. Proc. 121, 132 (16 Mar. 2002).

¹³² Cf. above text accompanying nn 28–32.

severe penalties that are likely to be infrequently imposed. A more targeted and thus more appealing remedy would be to permit Member States to impose general or tailored sanctions on the state that fails to comply.

Options Three and Four. Various versions of the third option have already been discussed. The current WTO agreements may already allow some versions of this option. I shall consider whether this option is appealing from the perspective of human rights protection, chiefly as compared to the fourth and final option.

The third set of options differs from the first in that it would permit but not require trade sanctions in response to human rights violations. The proposals in this category leave the decision whether to employ a measure to each individual country. This is an unappealing feature of these proposals. It means that human rights norms would be much more easily enforceable by economically powerful countries against economically weaker countries.

The proposals in this category are also problematic because, in different ways, they result in haphazard enforcement of human rights law. If only tailored sanctions were permitted, trade measures would be available to enforce only those human rights norms that culminate in the production of an imported good. Most human rights norms are wholly unrelated to the production of goods. From a human rights perspective, there would appear to be little reason to privilege the small subset of human rights norms that result in the production of an imported good. As noted, trade sanctions are probably no less effective as a whole at achieving improvement in human rights problems unrelated to the good being imported. Nor do PPMs seem less susceptible to abuse than general sanctions. Indeed, the regime of permissive countermeasures on which the WTO relies for the enforcement of panel and Appellate Body reports does not require any relation between the goods whose importation is restricted and the underlying trade law violation found by the DSB. It even permits cross-sectoral countermeasures, such as the suspension of rights under TRIPS in response to a violation of a DSB judgment regarding trade in goods.¹³³

If general sanctions were permitted, trade sanctions would be available to enforce human rights norms unrelated to the production of goods, but the resulting enforcement regime would be haphazard in a different way. If a provision were included like the one in the chapeau prohibiting discrimination in the imposition of trade sanctions, then general sanctions would be politically infeasible for the reasons set forth above, at least for all but the most egregious of human rights atrocities. But if discrimination were permitted, this method of enforcing human rights norms would be characterized by a

¹³³ Recourse by Ecuador to Article 22.2 of the DSU, Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/52, 9 Nov. 1999, available at <http://www.wto.org>.

troubling and potentially delegitimizing arbitrariness. This problem might be thought to be particularly serious for a body of law (human rights) based on the values of fairness, equality, and due process.

It is true that both of the problems identified above – the imbalance of power to impose sanctions effectively and the element of arbitrariness and haphazardness in the enforcement of human rights norms – are to a significant extent characteristics of the existing international legal system. But to carry these problems over into the trade regime would not simply perpetuate an existing problem; it would make matters worse. As noted, the aim of trade liberalization is to produce a world of specialized states, each dependent on others for essential goods. Such states are of course far more vulnerable to coercion through trade measures. The interdependence trade liberalization seeks to bring about thus exacerbates the problems of power imbalance and arbitrariness.¹³⁴

One might well ask why we should be concerned about the power imbalance and arbitrariness problems. If the effect of interdependence is to make states more vulnerable to being influenced by economic measures taken by other states, and if such measures were only permitted in response to violations of human rights norms, this should all be to the good as far as human rights enforcement is concerned. Why should it matter that the powerful states will have more power than the weak to employ such measures or that the measures will be applied haphazardly? Any successful human rights sanction will by definition result in the improvement of some human beings' rights. If interdependence makes such measures more effective, all the better. Improvement in the human rights situation of individual human beings is to be applauded even if it is the result of a measure imposed by a strong nation on a weak nation and even if the measure was imposed on some nations but not others. The perfect should not be the enemy of the good.

There is great force to this argument, but let me venture a response. Human rights law today covers a great deal of ground. It includes norms that sometimes conflict with each other. Nations differ on which norms have achieved the status of human rights, and on the importance of certain categories of human rights as compared with others. To tolerate a system in which powerful states may effectively impose on weaker states their views

¹³⁴ It might perhaps be argued that the increased interdependence that comes with globalization would correct the power imbalance problem, as, in an increasingly interdependent world, even rich and powerful nations would be dependent on other states for some essential goods and services. But, if so, the arbitrariness problem would remain, or even become worse. In any event, it is more likely that even with increased interdependence powerful nations will remain less vulnerable to economic coercion because they are more likely to produce most of their essential goods and because they have other means of making their influence felt (e.g., funding international organizations; foreign aid; military power), while weaker nations will remain vulnerable to powerful states and become vulnerable to economic coercion by equally weak states.

about what sorts of human rights should be protected and how this threatens to delegitimize the whole body of international human rights law. 'International human rights' would soon become little more than a euphemism for the norms that powerful states subscribe to. To be sure, this situation exists to a nontrivial extent today, but increased interdependence would exacerbate the problem.

The logic of trade liberalization may thus require not only the restriction of the unilateral use of trade measures but also the multilateralization of human rights enforcement. The decentralized pre-GATT regime relying on unilaterally imposed countermeasures for the violation of human rights and other norms of international law may be highly inappropriate in the increasingly interdependent world envisioned by the trade regime. But, as we have seen, centralizing control over human rights trade measures in a WTO with the power to mandate trade sanctions is politically infeasible, to say nothing of its desirability. The third option reflects a modest move in the direction of centralization. Because (we are assuming) the individual states' decision to impose sanctions in response to human rights violations would be reviewable by WTO panels and the Appellate Body, the ultimate decision about whether the trade measure would be allowed would depend on the judgment of those bodies about whether a human rights violation occurred and whether the other requirements included in the hypothetical provision (which would presumably at a minimum include the requirements of necessity and proportionality) have been met. But the decision to impose the measure would be made by the regulating state in the first instance.

A preferable regime along similar lines might be to establish a new arm of the WTO responsible for vetting in advance claims that trade sanctions are warranted because of human rights violations. If it agrees, this new arm would authorize the imposition of sanctions by Member States. This approach would have the benefit of allocating to an international body the power to weigh and possibly balance the human rights involved, as well as to assess the facts and decide which sorts of trade measures are warranted. Having the decision come before the imposition of the sanctions and having the decision be made by a body having greater expertise in and sympathy with human rights matters than existing organs of the WTO seems preferable to having the decision come after the fact in the context of existing WTO dispute settlement procedures.

This refinement of the third option alleviates but does not entirely solve the problems of power imbalance and arbitrariness. The decision to authorize the sanction would be centralized and entrusted to a presumably sensitive and sympathetic arm of the WTO, but the decision to impose the sanctions or not would continue to rest with the individual states. Is this approach preferable to the fourth option, which is to disallow the use of trade measures in response to human rights violations and keep the WTO out of the business of enforcing human rights norms altogether?

There are a number of potential problems with the third option from the perspectives of both trade law and human rights law. Even the most refined version of the third option would pose an important conflict with the goals of trade liberalization. As noted, the aim of trade liberalization is to increase wealth by inducing specialization among nations. If this goal were achieved, trade sanctions could be expected to become an ever more effective tool of human rights enforcement. But, for the very same reason, retaining the option of employing trade sanctions to advance human rights makes it less likely that this goal of the free trade system would ever be achieved. To the extent the international community retained the option of employing trade sanctions, states would continue to resist the free trade regime's inducements to extreme specialization. States would want to ensure that they continued to produce at least some of all of the goods they regarded as essential, lest they be vulnerable to such sanctions. If so, then it appears that the free trade system would be able to achieve its goal of full specialization only if the international community convincingly disavowed any possibility of trade sanctions being employed.¹³⁵

Indeed, since such a disavowal could in theory be reversed, achievement of full specialization would require a super-strong and convincing commitment by the international community in this regard. Since the Security Council remains empowered to impose trade sanctions, it is probably only because of the veto power that the most powerful countries would even begin to consider the possibility of placing themselves at the mercy of states that sell them essential goods or purchase the ones they produce. It might take some equally effective disavowal of trade sanctions in the trade regime to bring about the specialization contemplated by the trade system.

But the conflict is not just between the goals of trade liberalization and the goals of the human rights regime. Trade sanctions are also in tension with the human rights regime in a variety of ways. First, economic sanctions are themselves problematic from the human rights perspective. To achieve an improvement of the human rights situation in a country where human rights problems are occurring, such sanctions often make matters worse for the most defenseless in the target state. Indeed, the whole point of the sanctions is often to make matters worse for such people in order to spark or intensify opposition to the offending regime. Such sanctions thus treat human beings as pawns in a geo-political game. They violate the Kantian injunction that persons be treated as ends and not means, a principle that is arguably the foundation of much of modern human rights law. Attempts to induce a change in government, or in the behavior of an existing government, by using

¹³⁵ It is true that the trade system itself relies on trade sanctions as its mechanism for enforcing rights under the trade agreements. But, in this context, trade sanctions are employed in the service of trade liberalization. The possibility of such sanctions should not deter states from specializing; it should reassure them that other states will adhere to their trade commitments.

military force against innocent civilians is clearly prohibited by international humanitarian law. I do not claim that targeting innocent civilians with economic sanctions is also forbidden by international law, only that doing so is troubling from a human rights perspective. Scholars have defended 'smart sanctions', which minimize the collateral damage of economic sanctions much as smart bombs minimize the collateral damage of military operations.¹³⁶ Whether smart sanctions can reduce collateral damage to an acceptable degree remains to be seen. If not, then trade sanctions at best would advance the protection of human rights in the long term only by violating the human rights of persons in the target country in the short term.

Perhaps more importantly, imposing trade sanctions in response to human rights violations may well set back the goal of respect for human rights even in the long term. Advocates of trade liberalization maintain that there is in fact no conflict between the goal of advancing free trade and that of advancing respect for human rights. The trade regime does not seek trade liberalization for its own sake. It seeks trade liberalization because, among other things, it increases overall wealth. This goal of the trade regime is consistent with human rights protection because human rights are more likely to be respected in wealthy states than in poor ones. Rights are expensive.¹³⁷ The link between trade and economic and social rights is thus evident. A wealthy state is obviously more likely than a poor one to comply with the right to a decent standard of living.¹³⁸ That greater wealth advances protection of civil and political rights is more contested. Still, advocates of trade liberalization maintain that these rights as well are more likely to be complied with in wealthier states than in poor ones. They emphasize that wealth empowers people and frees them to fight for their civil and political rights. Any true and lasting advance in human rights protection, according to this view, requires an increase in standards of living in poverty stricken states and, for this reason trade liberalization is necessary for the advancement of human rights.

That free trade increases wealth is widely accepted among economists, but some economists rightly worry that, unless provision is made to distribute the fruits of the trade system equitably, only the already wealthy will benefit and

¹³⁶ See Matthew Craven, 'Humanitarianism and the Quest for Smarter Sanctions', 13 *Eur. J. Int'l L.* 43 (2002); see also Gary C. Hufbauer and Barbara Oegg, 'Targeted Sanctions: A Policy Alternative?', 32 *Law & Pol'y Int'l Bus.* 11 (2000).

¹³⁷ See, e.g., Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (1st edn, New York: W.W. Norton, 1999).

¹³⁸ See Univ. Dec. Hum. Rts. art. 25 (declaring that everyone 'has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control').

social and economic rights will not be advanced.¹³⁹ Whether civil and political rights will be advanced by free trade without direct enforcement efforts by the international community is an even more complex and debated question.

This is not the place to engage in this debate. I only note its centrality to the question of how the trade regime should approach human rights protection. If indeed trade sanctions imposed for human rights violations thwart the trade regime's goal of increasing wealth through specialization in the world economy, and if increased wealth is either necessary or desirable for the advancement of human rights, then employing trade sanctions to advance human rights may well be counterproductive. Trade sanctions may set back the cause of human rights in both the short and long term. If so, then it would appear that, from a human rights perspective, other strategies for advancing human rights – ranging from military force as employed in Kosovo to the less intrusive approaches employed by the UN Human Rights Committees – should be preferred.

Even if it were true that increased respect for human rights follows improvements in wealth and that trade liberalization increases wealth, it may also be true that a trade regime cannot function effectively unless at least some categories of human rights are effectively protected. Scholars have claimed that respect for some categories of human rights is essential to a well-functioning economy, which is in turn essential for a well-functioning international trade regime. Free expression and the rule of law are often placed in this category. If so, then it is arguable that the international trade regime should seek to identify and make some provision for the advancement of those categories of human rights, even if it otherwise eschewed any role in the direct protection of human rights on the theory that the best way to improve human rights is to increase wealth by promoting free trade.¹⁴⁰ All sides of this debate should be able to agree that the identification of such rights, and the elaboration of strategies for protecting them, is an appropriate function of the international trade regime.

¹³⁹ James Thuo Gathii argues that, because trade liberalization inevitably creates both winners and losers, the trade regime must 'account for and deal with both the negative and positive distributional impacts that frequently result from the rules of international trade'. James Thuo Gathii, 'Re-Characterizing the Social in the Constitutionalization of the WTO: A Preliminary Analysis', 7 *Wid. L. Symp. J.* 137, 148 (2001). The trade regime currently leaves it to the Member States to determine whether and how to alleviate the adverse impact of trade liberalization on certain sectors of society.

¹⁴⁰ See Loukas A. Mistelis, 'Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations', 34 *Int'l Law.* 1055, 1069 (2000) (arguing that human rights create the 'necessary healthy environment for economic activity').